# THE SCOPE OF BARGAINING UNDER EXECUTIVE ORDER 11,491

J. N. Baker

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Labor-management relations in the Federal Service are governed by Executive Order 11,491. The Order implements policies governing "officers and agencies of the Executive Branch of the Government in all dealings with Federal employees and organizations representing such employees." The essence of the Order is for representatives of an agency and representatives of a labor organization representing employees of the agency to "meet at reasonable times and confer in good faith with respect

(Block 20) - to personnel policies and practices and matters affecting working conditions." The end result is a collective bargaining agreement between the agency and the labor organization.

Yet, as in the private sector, limits are placed upon the scope of collective bargaining. The parties are prohibited from bargaining over matters precluded by:

> "...applicable laws and regulations, including policies set forth in the Federal Personnel Manual; published agency policies and regulations for which a compelling need exists under criteria established by the Federal Labor Relations Council and which are issued at the agency headquarters level or at the level of a primary national subdivision; a national or other controlling agreement at a higher level in the agency; and this Order."

Once bargaining begins, the threshhold question regarding each and every proposal submitted is whether or not the Order precludes negotiation over the subject matter covered. The purpose of this paper is to analyze the impact this limitation on the scope of negotiations has on labor-management relations in the Federal Service.

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Labor-management relations in the Federal Service are governed by Executive Order 11,491. [1] The Order implements policies governing "officers and agencies of the Executive Branch of the Government in all dealings with Federal employees and organizations representing such employees." [2] The essence of the Order is for representatives of an agency [3] and representatives of a labor organization [4] representing employees [5] of the agency to "meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions." The end result is a collective bargaining agreement between the agency and the labor organization.[6]

Yet, as in the private sector, limits are placed upon the scope of collective bargaining.[7] The parties are prohibited from bargaining over matters precluded by:

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Once bargaining begins, the threshhold question regarding each and every proposal submitted is whether or not the Order precludes negotiation over the subject matter covered. The purpose of this paper is to analyze the impact this limitation on the scope of negotiations has on labor-management relations in the Federal Service.

## I. THE SCOPE OF BARGAINING

The Order has provided two avenues by which a negotiability issue may be resolved. First, the Federal Labor Relations Council

is empowered to decide negotiability questions if so requested by the parties to the negotiations.[9] The Council is composed of the Chairman, Civil Service Commission; the Secretary of Labor; the Director, Office of Management and Budget; and "...such other officials of the executive branch as the President may designate from time to time."[10] A labor organization may appeal to the Council if it disagrees with an agency determination that (1) the proposal violates statute, regulation of appropriate authority outside the agency or the Order, or (2) the agency's regulation precluding negotiation violates law, regulation of appropriate authority outside the agency or the Order. Absent these circumstances, agency determination will control.[11] If appeal is taken to the Council, certain procedures must be followed to ensure (1) the appeal is determined on the merits, and (2) the Council considers all issues each party deems appropriate.[12] An agency's failure to comply with the Council's procedures is tantamount to a finding by the Council the proposal is negotiable.

In the private sector, challenges to the negotiability of particular subjects are made either by an employer making unilateral changes or by his refusal to bargain. In both instances, he counters an unfair labor practice charge by arguing the subject matter involved was not a mandatory subject of collective bargaining.[13] Section 19(a)(6) of Executive Order 11,491 makes it an unfair labor practice for an agency to "refuse to consult, confer, or negotiate with a labor organization as required by (the) Order."[14] The Assistant Secretary of Labor for Labor-Management Relations is tasked with deciding unfair labor practice complaints.[15] The Assistant Secretary's decision may be appealed to the Federal

Labor Relations Council by a party adversely affected.[16] Thus should an agency make unilateral changes concerning, or refuse to bargain over, a subject a labor organization believes to be negotiable (i.e., a mandatory subject of bargaining), he may file an unfair labor practice complaint with the Assistant Secretary of Labor for Labor-Management Relations. Should the agency argue the matter was beyond the scope of negotiations, the Assistant Secretary will decide the negotiability issue, with the adverse party able to appeal this determination to the Council.[17]

The Federal Labor Relations Council has reported its decisions in both areas.[18] The first step in my analysis will be a thorough study of these decisions. I believe this study will prove valuable in two respects. First, as the Council uses these decisions as stare decisis,[19] it will provide parties to negotiations with ready (albeit not infallible) guidelines within which the parties may deal with various proposals at the threshhold. A savings in time, money and effort could be realized should the appeal or Unfair Labor Practice process not be necessary.[20] Second, and of far greater importance, this analysis may well enable weaknesses in the system to be identified and, hopefully, corrected.

### A. NEGOTIABILITY DETERMINATIONS BY THE FEDERAL LABOR RELATIONS COUNCIL

I have broken the proscriptions of the Order into two basic categories: (1) those matters precluded by statute and/or regulation, and (2) rights reserved to management by the Order.

### 1. MATTERS PRECLUDED BY STATUTE AND/OR REGULATION

This category is divided into (1) rights and benefits covered by statute; (2) matters precluded by regulations of outside agencies, and (3) matters precluded by applicable agency regulation.[21]

#### a. RIGHTS AND BENEFITS COVERED BY STATUTE

Congress has seen fit to provide the majority of rights and benefits for Federal employees. Legislation has been enacted regarding pay,[22] retirement benefits,[23] life insurance,[24] health and accident benefits,[25] leave policies,[26] incentive awards,[27] performance ratings,[28] and training.[29] There has been little disagreement between agencies and labor organizations over whether or not a proposal deals with rights or benefits provided by statute. If disagreements do occur, the Council will merely cite applicable statutory language in rendering its decision. A case in point is Adjutant General of New Mexico.[30] The Union submitted a proposal that employees would be paid time and one-half for overtime. The applicable statute, 32 U.S.C. 709(g)2) provided:

> "Notwithstanding...any other provision of law... technicians (the employees involved in this dispute) shall be granted an amount of compensatory time off from their scheduled tour of duty equal to the amount of any time spent by them in irregular or overtime work, and shall not be entitled to compensation for such work."[31]

Given the statutory language, it is difficult to see any merit in the proposal and the Council, simply quoting the statutory language, reached that conclusion.[32]

b. REGULATIONS OF OUTSIDE AGENCIES

Regulations governing Federal employees are issued primarily by the Civil Service Commission.[33] Before analyzing cases in which regulations of the Civil Service Commission have affected the scope of negotiations, two procedural aspects must first be discussed. The first is the Council will only consider the applicability of regulations advanced by the agency as limiting the scope of bargaining.[34] It thus behooves an agency head to research thoroughly all applicable Civil Service Regulations when considering each and every proposal to be discussed. This makes for a rather cumbersome system since the range of regulations that could be interpreted as limiting negotiations is fairly comprehensive. The failure of an agency to undertake this study, however, will result in no negotiability determination being made and thus the proposal effectively being declared negotiable. The second procedural aspect to be considered is the Council itself will not decide the negotiability question but will refer the matter to the Civil Service Commission for resolution. If the Commission determines the proposal contravenes Civil Service regulations, the Council will incorporate the Commission's interpretation of its regulation as the Council's opinion.[35]

The case law sheds very little light on what types of proposals have been held non-negotiable by the Civil Service Commission. Chapter 335 of the Federal Personnel Manual[36] governs promotions and has been held to preclude negotiations regarding proposals that, in effect, would force the agency to select a certain employee:

"When a selecting official is considering a group of best qualified candidates and narrows his choice to two...he will select that candidate with the greatest length of service in the Office of Regulations and Rulings." [37]

The Civil Service Commission held this proposal violated Chapter 335, Sub-chapter 2 of the Federal Personnel Manual in that it violated management's right to "non-select" an employee.[38]

"Proposal X: When positions are not filled under the provisions of paragraph (a) above, the vacancy will be announced and a selection list will be prepared. The selection list will contain the names of the two employees rated 'best qualified' for promotion,... except for: Officer Corps candidates, the names of the two 'best qualified' employees who have requested reassignment, the names of all employees who have requested voluntary demotion, and the names of those outside candidates who are considered to be better qualified than internal candidates rated 'best qualified.' All candidates who appear on the selection list will be given simultaneous consideration by selecting officials, who should attempt to pick the best qualified person on the list to fill the vacancy." [39]

The Commission held this proposal violated Chapter 335 in that the Manual provided should sufficient candidates for promotion be "best qualified" [40] then reasignment eligibles[41] would be considered first, whereas the union proposal envisioned candidates applying from the unit would have priority consideration.[42]

In Charleston Naval Shipyard the Commission held a union proposal giving the Union "...the right to review all standards used in the formulation of Merit Promotion Procedures" violated Chapter 337, Sub-chapter 3-3 of the Manual prohibiting such information from being made available to anone except "...persons participating in job elements examining in an official government capacity." [43]

Proposals concerning wages and incentive awards have also been held to violate the Federal Personnel Manual. The barbers

at Naval Air Station, Memphis, Tenn., were paid by commission and submitted the following proposal:

> "Employees paid by commission on a percentage of sales basis will be paid at least 85% or no less than the percentage paid to pieceworker employees of other Non-Appropriated Fund establishments in the wage area."

The Commission held:

> "It is the opinion of the Commission that wages and commissions of barbers employed by the Memphis Naval Air Station NAF activity are properly fixed in accordance with the wage fixing procedures authorized for special schedule categories in FPM SUPPLEMENT 532-2."[44]

The Union representing employees of the Tobacco Marketing Division of the Agricultural Marketing Service (USDA) proposed:

> "The number of incentive awards given to employees of the Tobacco Division of the Agricultural Marketing Service shall not vary by more than 1% less than those for employees of the other Department divisions."

The Commission held this proposal violated FPM Chapter 451, Sub-Chapter 1-2(a)(1) - (3) in that such awards are to be based "...only on merit."[45] Finally, in IRS, Philadelphia District, the Union submitted a proposal that the agency was to provide free parking places for employees who used their personal cars on government business. The Council referred the proposal to the General Services Administration who held that GSA regulations (41 CFR 101.17-101.1 through 101.17-102.1) precluded anyone except General Services Administration from obtaining parking spaces, and then only for government vehicles.[46]

The Council will uphold the negotiability of a proposal over an agency objection it violates applicable outside regulation for two reasons. The first is if, in the opinion of the Council, the agency misconstrues the proposal. A ruling to

this effect provides little guidance since, although it results in the proposal being held negotiable, it means only the agency failed to carry its burden.[47] The second reason is if the Civil Service Commission, on request from the Council, holds the proposal does not violate Civil Service regulations or the Federal Personnel Manual.[48] Cases in this category can be utilized as stare decisis regarding subsequent proposals.

In National Border Patrol Council the union submitted inter alia, the following proposal:

> "When the Service does an effective job of selecting and training its employees, it should have a pool of career employees with potential for career advancement for all positions covered by this plan. Therefore, the area of consideration will not be expanded to seek candidates outside the Service unless less than three eligible highly qualified employees bid for the position."

The agency head determined the proposal violated Chapter 335 of the Federal Personnel Manual. This determination was overruled by the Civil Service Commission.[49] In Aberdeen Proving Ground, a union proposal that employees assigned to jobs in a higher classification in excess of 30 days be temporarily promoted was held by the Civil Service Commission not to violate Civil Service Commssion regulations contrary to the agency determination.[50] The Council departed from its normal procedure in Social Security Administration Headquarters, Baltimore. The union submitted a proposal "that existing GS-13 positions (in the Unit) be filled by employees with (Unit) experience at the GS-12 level." The agency argued the proposal violated Chapter 335 of the Federal Personnel Manual. The Council, without seeking an interpretation from the Civil Service Commission, held the proposal negotiable.[51]

The Council gave no reason for its departure from its usual practice and one can envision serious problems ensuing should the Commission disagree with the Council. However, given the similarity of this case to the Border Patrol case,[52] I imagine the Council felt it unnecessary to seek another opinion on the same issue.

c. APPLICABLE AGENCY REGULATIONS

Prior to the promulgation of Executive Order 11,838,[53] agencies were permitted to interpose their own regulations as a bar to negotiations with the limitation that such regulations must be "issued to achieve a desirable degree of uniformity and equality in the administration of matters common to all employees of the agency..."[54] This caveat only prohibited subordinate activities from interposing local regulations. Regulations with agency-wide applicability were successfully interposed on numerous occasions. However, Executive Order 11,838 established the "compelling need" criteria.

> "An agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws and regulations, including policies set forth in the Federal Personnel Manual; published agency policies for which a compelling need exists under criteria established by the Federal Labor Relations Council and which are issued at the agency headquarters level of a primary national subdivision...." (emphasis mine)[55]

The Council has promulgated regulations defining "compelling need."

> "A compelling need exists for an applicable agency policy or regulation concerning personnel policies and practices and matters affecting working conditions when the policy or regulation meets one or more of the following illustrative criteria:

(a) The policy or regulation is essential, as distinguished from helpful or desirable, to the accomplishment mission (sic) of the agency or the primary national subdivision;

(b) The policy or regulation is essential, as distinguished from helpful or desirable, to the management of the agency or the primary national subdivision;

(c) The policy or regulation is necessary to insure the maintenance of basic merit principles;

(d) The policy or regulation implements a mandate to the agency or primary national subdivision under law or other outside authority, which implementation is essentially nondiscretionary in nature; or

(e) The policy or regulation establishes uniformity for all or a substantial segment of the employees of the agency or primary national subdivision where this is essential to the effectuation of the public interest." [56]

From a review of the cases in this area, an argument can be made the Council is going to find a compelling need exists (i.e., the proposal is non-negotiable) only if two factors are present: (1) the regulation in question explicitly conforms to statutory or Civil Service Commission mandate, and (2) the proposal in question completely disregards that mandate.

To date, the Council has found a "compelling need" in only one case. In Adjudant General, State of Kentucky, the union proposed Reduction-in-Force (RIF) procedures that would have established seniority as a primary factor. The applicable National Guard Board regulations provided a technician's military performance must be considered in any RIF determination. The Council held:

"Hence, the NGB regulations implement in an essentially non-discretionary manner the statutory mandate that technicians maintain military membership....whereas, in contrast, the union's proposal would focus solely on the technician aspect of technician employment...and thereby sanction technicians unqualified to hold the military grade for technician positions being retained in those positions as a result of a RIF. Accordingly, since

> the NGB regulation implements a statutory mandate ...which implementation is essentially non-discretionary in nature, we find that a compelling need exists for the regulation to bar negotiations..."[57]

In Kansas National Guard, the union representing civilian technicians submitted a proposal to the effect the members of the unit no longer be required to wear the National Guard uniform. The agency interposed the National Guard Board regulation requiring the uniform to be worn. After deciding the National Guard was a "primary national subdivision..." the Council went on to hold since the National Guard Technician Act of 1968[58] does not establish the uniform requirement, the regulation failed to meet the compelling need test.[59] In Army Material Development and Readiness Command, the Council held the Army regulation did not conform to promotional criteria established by the Federal Personnel Manual.[60] Finally, in GSA, Region 5, the Council held a union proposal requiring the agency to furnish office space to the union was negotiable over the agency's objection it conflicted with internal agency regulations:

> "Thus, there is no showing that these internal regulations, intended solely to restrict the assignment of office space within GSA, implement the mandate of the statute..."[61]

This would be an easy test to administer based on Council decisions to date; but it certainly does not deal with subsections (a), (b), (c) and (e) of 5 C.F.R. 2513.2.[62] It can be surmised the Council is going to place a heavy burden on the agency to show compelling need. It would appear the agency would have more success alleging the proposal violated either statute, outside regulation or the Order, certainly a viable alternative in the cases discussed. Clearly, the proposal in

Adjudant General, State of Kentucky is in violation of 32 U.S.C. Sec. 709(b)[63] and most likely contravenes the agency's right to retain employees under Sec. 12(b)(2) of the Order.[64] Likewise the agency could have argued in Army Material Development and Readiness Command the proposal interfered with management right to promote under Sec. 12(b)(2).[65] In GSA Region 5, the argument would have been more complicated, but the agency could have relied on GSA interagency regulations detailing the requirements necessary for securing office space[66] vice its own "internal" regulation.

It would appear agencies are starting to abandon the internal regulation defense in favor of the above. A case in point is Immigration and Naturalization Service. In this case, the union proposed that the uniformed border patrolmen it represented be allowed to wear a "union patch" on their uniforms subsequent to the removal of the bi-centennial patch required for 1976. The agency did not rely on agency uniform regulations in arguing non-negotiability; but rather argued the proposal violated Sec. 12(b)(5) of the Order[67] on the ground the union patch would lead the public to believe the patrolmen were representatives of the union vice members of the Border Patrol. The Council sustained the agency's position on the ground the proposal effectively negated the agency's "...right...to determine the methods and means...by which (agency) operations are to be carried out."[68] There was no mention in the opinion of the agency's uniform regulations which clearly would have precluded the wearing of such a patch.[69] It can be argued the agency would have been successful with this argument in Kansas National Guard.

2. RIGHTS RESERVED TO MANAGEMENT BY THE ORDER - §§11 & 12(b

a. WORKING CONDITIONS, ETCETERA...§§11(a)

> "An agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions..." [70]

> "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." [71]

Under the NLRA, the question of the scope of negotiations arises when an employer makes a unilateral change "...in respect to rates of pay, wages, hours of employment, or other conditions of employment or refuses to bargain over a particular subject." The labor organization responds by filing an Unfair Labor Practice charge with the Regional Director. The employer will counter this charge by alleging the unilateral actions he took, or the subjects in question, were beyond the scope of bargaining.[72] Since the "... matters affecting working conditions..." language of the Order is similar to the "conditions of employment..." language of the Act, one would expect at least some litigation as to the extent this language of the Order limits the scope of negotiations. Instead, the Council has ruled Section 11(a) is applicable to the scope of negotiations question in only four rather limited situations.

The most significant situation is proposals affecting persons outside the unit. The Council has held an agency is not required to bargain over proposals regarding who will provide cafeteria services, [73] the filling of threshhold supervisory positions outside the unit, [74] reserved parking spaces for patients; [75] and

state educational benefits available because of state National Guard affiliation and not because of union membership.[76] Second, the Council has ruled Section 11(a) precludes bargaining over proposals whereby a union desires to place "representatives" on management committees. In Customs Service, Region VII, the union proposed a union representative sit on a budget committee. The union representative would only present the union's viewpoint and make "non-binding" recommendations.[77] In Data Processing Center, Austin, Texas, the union proposed: "The Union shall have the right to designate a representative to serve as a member on the Position Management Committee."[78] In both cases, the Council held the proposal non-negotiable:

> "In our opinion, the proposal...is outside the agency's obligation to bargain; it does not directly relate to personnel policies and practices and matters affecting working conditions within the meaning of Section 11(a) of the Order."[79]

The third situation in which the Council has applied Section 11(a) to a negotiability question involves a proposal affecting "grade levels" assigned to employees of the Internal Revenue Service. Each case that was processed by the office was assigned a degree of difficulty by the supervisor. The employees were then assigned these cases with the degree of difficulty corresponding to the grade level of the employee. The union proposed that any employee who disagreed with the grade level assigned to a case may file a grievance. The Council held the proposal was outside the scope established by Section 11(a):

> "We are of the opinion that a supervisor's assessment of the level of complexity of a work assignment does not fall within the meaning of the phrase 'personnel policies and practices and matters affecting working conditions' and hence does not fall within the obligation to bargain under Section 11(a) of the Order."[80]

The final case in which Section 11(a) was applied to the question of the scope of negotiations was Bureau of Prisons. In negotiating a nationwide agreement, the union requested a proposal be included in the agreement dealing with matters to be negotiated at the local level, matters that may not necessarily be included in the nationwide agreement. The agency argued this was beyond the scope established by Section 11(a). The Council held:

> "In more detail, if, in a comprehensive bargaining unit as is involved in the present case, matters which pertain only to one or more facilities within the unit are proposed in negotiations at the level of recognition, such a proposal would not fall outside the obligation to bargain under Section 11(a)...simply by virtue of its less than unit-wide applicability." [81]

b. PERMISSIVE BARGAINING

> "However, the obligation to meet and confer does not include matters with respect to the mission of an agency, its budget; its organization; the number of employees; and the numbers, types and grades of positions or employees assigned to an organizational unit, work project, or tour of duty; the technology of performing its work; or its internal security practices." [82]

> "Matters which are within the ambit of Section 11(b), although exempted from the obligation to negotiate, may be negotiated if management chooses to negotiate. In other words, while there is no requirement that matters within the ambit of Section 11(b) be negotiated, the Order does permit their negotiation so that an agreement which results from the negotiation of such matters does not, thereby, fail to conform to the Order." [83]

The agency must therefore interpose a Section 11(b) bar at the level the contract is being negotiated on or they will be foreclosed from asserting the bar. The agency cannot rely on Section 15 review by the head of the agency to interpose a Section 11(b) bar once a local representative has negotiated and reached agreement on the proposal. [84] The Council has applied this reasoning to Section 11(a) also. [85]

## (1) STAFFING PATTERNS

The majority of Section 11(b) cases decided by the Federal Labor Relations Council involve proposals having to do with "staffing patterns." The leading case is Griffiss Air Force Base. The civilian firefighters submitted the following proposals:

> "(1) Proposed Article, Civil Disturbances, Section 1: Unit Employees will not be used to quell civil disturbances in order to comply with Mutual Aid Agreement. Unit Employees will be used to perform Rescue, Fire Control, and Extinguishment of Fires only.
>
> Section 2: Unit Employees and Fire Equipment will remain in Quarters on Alert Status when demonstrations are anticipated in area of Griffiss Air Force Base, as Professional Firefighters.
>
> (2) Proposed Article, Unrelated Duties, Section 1: Employer agrees not to require Unit Personnel to participate in unrelated duties, e.g., Barrier Detail and after-hour I & E Calls unless required due to emergency conditions on Base."

The Council held the proposals non-negotiable.

> "...the phrase 'staffing patterns' of the agency, as used in the Report in explaining the clause in 11(b) 'numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty,' embraces the content of the individual structures and manpower complements for the various organizational units (e.g., the number and types of positions and employees assigned to the fire department) these organizational allocations of positions and people are integrally related to and dependent on the duties that will be performed by the individual positions involved. In other words, here, too, the assignment of duties to the individual positions is the critical first step by the agency in determining the staffing patterns for that agency."[86]

The Council went on to hold this proscription exists even though the duties sought to be excluded might be "totally unrelated to the ordinary duties which might be expected to be performed by firefighters."[87]

The next "staffing pattern" case decided was Louisville Naval Ordnance Station. The agency interposed a Section 11(b) objection

to a proposal that position descriptions only contain tasks normally related to the position and "catch-all" phrases could no longer be utilized.

"Article 18, Section 6

a. When the term, 'such other duties as may be assigned' or its equivalent is used in a position description, the term is mutually understood to mean 'tasks that are normally related to the position and are of an incidental nature.'" [88]

The Council held:

"In summary, nothing in the Order renders the mere definition and clarification of general terms in job descriptions, as proposed by the union, outside the agency's obligation to negotiations under Section 11(b) of the Order. Therefore, the agency's determination of non-negotiability must be rejected." [89]

At this point, the International Association of Machinists and Aerospace Workers attempted to expand Louisville by submitting a proposal that the assignment of personnel be limited to duties only included in the position description.

"Section 7. In the interests of maintaining morale in a good employer-employee relationship, the employer agrees that, to the fullest extent possible in maintaining the efficiency of the Government operations, every effort will be made to assign work within the scope of the classification assigned as defined by appropriate classification standards...(Emphasis in body supplied.)" [90]

The Council was not willing to take this step.

"In the present case, the union's proposal would... limit the agency in the assignment of duties to unit employees unless conditions prescribed in the agreement exist--here, the conformity of the duties with the scope of job-grading standards. Accordingly, we find that the union's proposal is excepted from the agency's obligation to bargain under Section 11(b) of the Order." [91]

The Council has steadfastly maintained this position in a number of cases. [92]

(2) NUMBERS OF EMPLOYEES

Section 11(b) also has been held to bar negotiations on proposals requiring a certain number of employees be assigned a particular task.

> "Overtime, night, Sunday and Holiday assignments within a station, and within the employee's regularly assigned duties, will be distributed equitably among those employees qualified to perform the work. For this purpose, 'equitable distribution' shall mean equal periods (1/2 day equal 1 period) of overtime for all participating employees computed by the day. To assure implementation of this section at sea and airports, the Agency agrees to the following rations: All Citizen Passengers--1 Inspector to 30 passengers; All Alien Passengers--1 inspector to 20 passengers." [93]

The Council ruled: "Section 11(b) of the Order expressly provides that the number of employees so assigned to a work project or tour of duty are outside the agency's obligation to bargain." [94] Included within this caveat would be a proposal simply requiring the agency to distribute the work of the agency equitably among all employees. [95]

(3) TOURS OF DUTY

The Plum Island Animal Disease Laboratory is engaged in research on exotic disease of animals. To provide for round-the-clock operation and maintenance of its building and equipment, it initially employed four crews of 11 men each who worked on three rotating, weekly shifts, supplementing the regular 8-hour, 5 days per week maintenance employees. The agency then decided its work could be more effectively accomplished by eliminating the third shift in one laboratory and establishing two new fixed shifts, working on a regular five day basis. Concurrently, the union then submitted the following proposal during bargaining on a supplemental agreement:

"Changes in personnel from one scheduled shift to another or from one existing five day period to another, are assignments or scheduling of personnel and not changes in tours of duty. Should management ...determine that a change in scheduled tours of duty is necessary...such determination will be presented to the local representatives...(c)onsultations will be undertaken to arrive at a mutually aceptable schedule. If consultation does not result in a mutually acceptable tour of duty...negotiations of a formal schedule will be initiated; these negotiations shall be conducted in good faith to assure no undue delay in establishing an effective date for a revised schedule." [96]

n essence, the union desired any proposed change in the status uo be subject to negotiation and no change be made by the mployer until agreement was reached with the union. The Council eld any change in "tours of duty" was a right reserved to manage-ent under Section 11(b) of the Order and thus this proposal was on-negotiable.[97]

(4) EMPLOYEE EXCHANGES

Agencies have asserted proposals involving employee exchanges f shift, overtime, and placement assignments are also exempted rom the obligation to bargain under Section 11(b) of the Order.

"Article 22, Section 4: An employee, upon request, will be allowed to swap shift assignments and/or days off if a qualified replacement, approved by the supervisor, is available and willing to work and if the work flow is not impaired.

Article 23, Section 3(A): An employee will, upon request, be released from an overtime assignment if a qualified replacement, approved by the supervisor, is available and willing to work, and if the work flow is not impaired.

Article 29, Section 3: An employee will, upon request, be allowed to swap placement assignments, if a qualified replacement, approved by the supervisor, is available and willing to work and the work flow is not impaired." [98]

n holding these proposals negotiable, the Council reasoned:

"...we are of the opinion that, contrary to the agency's contention, the subject proposals are not excepted from the agency's bargaining obligation under Section 11(b) of the Order, since they do not concern the structure of the shifts, the job constituency of the overtime activities, or the nature or components of placement assignments." [99]

The Customs Service case has been held to allow negotiations on a proposal allowing employees the right to request particular shifts, with preference being given to seniority in the event two or more employees request the same shift. [100]

The Council has held non-negotiable proposals allowing employees to rotate "details" ("temporary assignment of employee to a different position for a specified period, with the employee returning to his regular duties at the end of the period."). [101]

(5) FLEXITIME

Flexitime proposals:

"Each daily tour of duty will include a core period to be worked by all employees from 9:00 a.m. to 2:30 p.m. The additional three hours to be worked within the flexible time bands during the 6:00 a.m. to 5:30 p. m. time period." [102]

were held by the Council to be negotiable, albeit with limitations:

"As previously noted, the union concedes that the proposal does not give the employee the right 'to refuse to appear for work when ordered to do so." Moreover, as expressly stated by the union, the proposal is not intended to limit management's right "to require that individual employees be assigned specific tours of duty outside the flexible allowances when such assignment is necessary to accomplishing the mission.'" [103]

(6) TECHNOLOGY

Section 11(b) allows an agency to limit the scope of bargaining over technological changes.

"Article 18, Section L: Appropriate communication equipment will be installed in all Immigration vehicles in those places where Officers are required to work in remote areas. The equipment will provide for prompt contact with local law enforcement authorities.

Article 18, Section O: For safety considerations, appropriate communication equipment will be provided for communications between all Agency vehicles and their assigned offices."[104]

The agency head determined the proposals concerned the technology of performing the agency's work and thus were excluded from the bargaining obligation by Section 11(b) of the Order. The Council upheld this determination: "...the proposals in the instant case would require the agency to negotiate...with respect to the installation or provision for use in its vehicles of communications equipment." [105]

This decision is to be contrasted with Border Patrol, Yuma, Arizona. The union proposal in this case read:

"Drag roads will be maintained on a regular basis and in such a manner so that they are reasonably smooth and free of ruts, potholes, and washouts and any other roughness or irregularity which may be caused by usage, weather, or other contributing cause or element." [106]

Over an agency contention this proposal involved "bargaining over the technology of its work," the Council held the proposal was "intended to reduce the chance of injury to the officer" and would not restrict the agency from employing any technological means whatsoever to accomplish that goal.[107]

(7) INTERNAL SECURITY

Section 11(b) also exempts "internal security practices" from the scope of bargaining. Thus the following proposal: "Section 4. The employer agrees to make employees aware when (the Employer) is observing an employee's work performance," was held non-negotiable.

"It is clear that the phrase 'internal security practices' in Section 11(b) includes the actual system or plan of internal security adopted by the agency ...Therefore, we find that ...spot checks, security checks and similar unannounced observations of internal

security policemen during the execution of internal security practices as mandated by the internal security system adopted by the activity and conducted solely for the purpose of evaluating the adequacy and effectiveness of such internal security system is essential to the effective functioning of, and thus a necessary part of, the internal security system itself."[108]

c. RETAINED AGENCY RIGHTS - (§§12(b)

The majority of negotiability issues arise as a result of Section 12(b) of the Order.

"...management officials of the agency retain the right, in accordance with applicable laws and regulations --

(1) to direct employees of the agency;

(2) to hire, promote, transfer, assign, and retain employees;

(3) to relieve employees from duties because of lack of work or for other legitimate reasons;

(4) to maintain the efficiency of the Government operations entrusted to them;

(5) to determine the methods, means and personnel by which such operations are to be carried out; and

(6) to take whatever actions may be necessary to carry out the mission of the agency in situations of emergency." [109]

The Federal Labor Relations Council has maintained since the advent of Executive Order 11,491 that any union proposal interfering with the management rights delineated in Section 12(h) would be non-negotiable. This proscription is mandatory; and an agency head's determination under Section 15 that a particular proposal contravenes Section 12(b) will prevail notwithstanding the local bargaining representative having allowed its inclusion in the agreement. The Council is the ultimate arbiter as to whether or not a particular proposal conflicts with Section 12(b) of the Order.

(1) HIRE, PROMOTE, TRANSFER, ASSIGN AND RETAIN.... §§12(b)(2)

The majority of litigation involving Section 12(b)(2) concerns promotions. The Veteran's Administration Research Hospital, hicago, case held negotiable a proposal under which the union ould request that, after an initial promotion determination, he "next highest level supervisor who has not participated in he proposed selection..." would review the determination and ecide who would be promoted. His decision would be final. The ouncil held this proposal would not violate management's right o promote, since it only related to who was deciding to promote nd not who was going to be promoted.[110] In addition, a labor rganization may negotiate regarding the "areas of consideration" -- i.e., from which group of employees the promotee must e selected.

> "...The only area in dispute is whether existing GS-13 positions will be filled by employees with Bureau experience at the GS-12 level (Union's proposal) or whether these GS-13 positions will be open to Headquarters-wide competition (management's unilateral determination)." [111]

> "...we find that the union's proposal that existing GS-13 positions in BHI be filled by employees with Bureau experience at the GS-12 level is negotiable." [112]

n the other hand, proposals that require an agency to promote certain individual upon occurrence of a specific event have een held to be non-negotiable.

> "Section 4. In the case of demotions taken voluntarily in lieu of separations of a reduction in force action, the Employer will promote in inverse order of their standing on the reduction in force register at the time of the demotions the employee so affected to the position from which he was demoted (or one exactly like it) when such a position becomes vacant and is to be filled." [113]

We have previously noted that Section 12(b)(2) dictates that management officials retain their existing authority to promote employees. Moreover, since the emphasis of 12(g)(2) is on the reservation of management authority to decide and act on this matter, no right accorded to a union may be permitted to interfere with this authority." 114

The agency has absolute discretion under Section 12(b)(2) o decide who it will hire to fill a vacancy.

"In the Council's view, the proposal presently before us would require either (1) that management must fill all vacant positions in accordance with the conditions set forth in the proposal ...As to (1), the proposal categorically negates the decision and action authority expressly reserved to management officials authority expressly reserved to managmenet officials under Section 12(b)(2) of the Order...as well as the 'implicit and co-extensive authority, under Section 12(b)(2) to decide not to take such action." 115

ollowing this line of cases, the Council went on to hold an gency is not required to negotiate over a proposal to have on-unit employees perform unit functions during weekends and olidays on the grounds it would require the agency to hire dditional personnel. 116

The only case decided regarding transfers was Immigration nd Naturalization Service.

"5 - 3.A.6. Return from Overseas Tour. Employees selected for overseas positions under this or preceding plans shall be reassigned to the Continental United States after the completion of an overseas assignment that will not exceed three years." 117

he council held this proposal non-negotiable on the ground it nterfered with management's right to transfer and assign personel.

"Consequently, the proposal imposes a limitation on the timing of management's action...under Section 12(b)(2). The authority reserved to management under Section 12(b)(2) necessarily encompasses the timing of the decision and action involved (in the proposal)." 118

(2) EFFICIENCY OF GOVERNMENT OPERATIONS - §§12(b)(4)

Agencies will challenge the negotiability of a proposal that would require the expenditure of monies as violative of Section 12(b)(4). The leading case is Naval Supply Center, Charleston, S.C. The Union submitted a basic work-week proposal: "The basic work week will be 8:00 a.m. to 4:00 p.m.., Monday through Friday." [119]The head of the agency held the proposal non-negotiable since the activity was manned seven days a week and the agency would thus be forced to pay overtime to those employees who worked on Saturdays and Sundays. This, the agency contended, impaired the efficiency of the Government operations entrusted to them. The Council applied a balancing test between potential increased costs and potential increased benefits ("employee satisfaction, improved performance, contribution of money-saving ideas, improved health and safety..."). The Council went on to say the agency bears the burden to sustain a determination the proposal impairs the efficiency of Government operations and a simple recitation that the proposal may force the agency to expend monies will not carry this burden. Therefore, the Council held the basic work-week proposal to be negotiable.[120]

Another area in which the Council has been faced with deciding the limits of Section 12(b)(4) concerns production goals. The Patent Office Professionals Association submitted a proposal substituting union formulae for agency formulae as applied to production goals for the unit in question. The Council held:

> "...the essence of the proposal is to ensure that the production goals will be assigned in a manner consistent with what is, in the union's view, a statistically reliable calculation which indicates

how much production can reasonably and equitably be expected to achieve." [121]

The Council held the proposal to be negotiable. While not citing the "balancing test" language employed by Charleston, the quoted language in this case certainly indicates some type of balancing test was being applied.

(3) CONDUCT OF OPERATIONS - §§12(b)(5)

The majority of negotiability cases decided by the Federal Labor Relations Council concern union proposals designed to protect work historically performed by unit employees. The leading case is Tidewater. The union submitted two proposals:

> "Art. IX, Section 1: The employer agrees that work regularly and historically assigned to and performed by bargaining unit employees covered by this agreement will not be assigned to military personnel or to PWC employees excluded from the bargaining unit.
>
> Art. XXV, Section 1: It is understood by the parties hereto that decisions regarding contracting work out of the unit and transfer of work within the PWC are areas of discretion of the Employer. However, it will be the policy of the Employer that work normally performed in the unit will not be contracted out or assigned to employees not in the bargaining unit unless such work is beyond the capacity or capability of unit employees to perform or if economic situations or technological changes dictate that such work be performed outside the unit." [122]

The Council held both proposals non-negotiable as violative of Section 12(b)(5). In a long line of cases, the Council has upheld this determination. [123]

However, the Council has held negotiable proposals that would not allow the agency to assign overtime to non-unit personnel except in extraordinary situations.

> "The employer shall not assign normal scheduled overtime to the employees who do not perform this job description during the week except in emergency situations." [124]

> "Supervisors, Shop Planners, Planners and Estimators or Employees not covered by this Agreement shall not be assigned to perform the duties of employees in the unit on overtime assignments for the sole purpose of eliminating the need for such employees on overtime." [125]

It is difficult to ascertain how viable this apparent exception to the work preservation prohibition is, however. In McClellan Air Force Base, the following proposal was held non-negotiable:

> "Employees will not be systematically excluded from receipt of overtime by management employing other personnel for the purpose of denying overtime to said employees."

Coast Guard, Miami, is distinguished as involving "...merely a procedure for the assignment of work which management has designated to be performed as scheduled overtime." The Council distinguished Philadelphia Naval Shipyard as follows:

> "Unlike the proposal in Philadelphia, it is not 'solely concerned with the assignment of overtime' and it clearly involves more than a mere procedure for the assignment of employees to overtime, as the union contends. In our opinion, the literal language of the proposal...'explicitly would deny management the authority to assign bargaining unit work to non-unit employees for the purpose of reducing or eliminating the necessity for overtime work. That is, the proposal before us contains no qualification or clarification of its express restriction on management's 'employing other personnel for the purpose of denying overtime to (unit) employees.'" [126]

The effect of these proposals is the same -- to circumscribe management's ability to assign overtime to non-unit employees. The distinctions the Council makes between Philadelphia Naval Shipyard and Coast Guard Miami on the one hand and McClellan Air Force Base on the other seem rather forced to me. However, since the Council has not overruled Philadelphia Naval Shipyard, proposals utilizing that language should still be negotiable. They will most likely accomplish

the same purpose as a proposal modeled after McClellan Air Force Base.

Another matter the Council dealt with under Section 12(b)(5) was "on call." In Public Health Service Hospital, Seattle, the union submitted a proposal that should the agency determine employees were required to be "on call," each employee so assigned would have the right to refuse such assignment. Additionally, if the employee chose to accept the assignment, no restrictions could be placed on his or her movements. Finally, the employer "could not impose any restraint, interference, coercion, discrimination or take any retributions against any employee who refuses to serve in an 'on call' status or who, when assigned 'on call' should not be available when called." Over agency objection that this proposal would, in effect, preclude the agency from determining that "on call" was the appropriate means for providing the hospital coverage deemed necessary, the Council held the proposal negotiable.

> "However, on-call time, which is uncompensated time spent by the employee away from the worksite pursuing activities predominantly in his own interest, clearly cannot be regarded as part of the operations of the agency...Hence, where, as here, a union proposal to negotiate with respect to the use of on-call time, Section 12(g)(5) may not be asserted as a bar to negotiations."[127]

(4) EMERGENCIES - §§12(b)(6)

The final reserved management right the Council has dealt with regards management's prerogatives during periods of emergency.

> "Union-employer business by a union representative, or an employee, performing work compensable under overtime laws is not permitted except in emergencies."

The agency argued this proposal would allow for overtime compensation for labor relations duties in emergencies. Thus, the agency went on, the collective bargaining agreement would limit management's right to take "whatever actions may be necessary" during periods of emergency, including precluding the performance of labor relations duties. The Council, distinguishing between "personal exigencies of individual employees" and "agency emergencies in carrying out its mission," held the proposal did not violate Section 12(b)(6) and was therefore negotiable.[128]

B. UNFAIR LABOR PRACTICES

The only participation (as reported by Council decisions), to date, by the Assistant Secretary of Labor for Labor-Management Relations in scope of negotiating determinations involves unilateral changes of agency regulations. It is apparent, if the regulation affects personnel policies and practices and matters affecting working conditions, the imposition of such a regulation will violate Section 19(a)(6) of the Order unless the subject matter of the regulation has been removed from the scope of bargaining by the Council or the Council can find a "compelling need" for the regulation.[129]

In Air Force Defense Language Institute, the agency unilaterally changed a regulation controlling overseas assignments. The union filed a Section 19(a)(6) unfair labor practice charge with the Assistant Secretary arguing a refusal to bargain. The agency argued the regulation in question properly limited the scope of negotiations on the subject based upon criteria in effect at that time. The Assistant Secretary upheld this determination and the union appealed to the Council. The Council, applying

the standards announced in Merchant Marine Academy,[130] held the regulation in question did not conform to appropriate criteria and thus was not a bar to negotiations.[131]

In National Border Patrol Council, the agency proposed changes in its personnel management regulations which were met by counter proposals by the union. No agreement was reached and the matter was submitted to the Federal Services Impasse Panel, which dismissed the petition of the union because of the threshhold questions concerning negotiability. The agency determined its proposals were non-negotiable and affected the changes. The union appealed the agency negotiability decision to the Council. The Council held:

> "Where negotiability issues arise in the context of such unfair labor practice proceedings they are often inextricably intertwined with disputed issues of fact which must be resolved in order to arrive at a conclusion concerning the motivation of the parties. Such issues of fact are best resolved through the adversary process of a formal hearing... The proper forum in which to raise such issues is an unfair labor practice proceeding before the Assistant Secretary."[132]

The Council has yet to rule on a decision of the Assistant Secretary involving a negotiability question. Thus, although §§19(a)(6) should shed some light on the scope of negotiations, it would appear this approach has been neglected in favor of the direct appeal to the Federal Labor Relations Council under §§11(c) of the Order.

### C. MISCELLANEOUS BARS TO NEGOTIATION

The remaining issues decided by the Council pursuant to its authority under Section 11(c) of the Order involve grievance procedures, official time, and dues withholding. An agency cannot, either by regulation or by a determination of non-negotiability,

foreclose the scope of negotiations as to what the grievance procedure will be.[133] No proposal regarding the official time employees are entitled to for periods spent in negotiations that exceeds the limits set by Section 20 is negotiable.[134] However, a proposal to allow employees to receive time for periods spent in negotiations during mid-contract is negotiable.[135] Finally, an agency may not, by regulation, limit the requirements of Section 21 involving dues withholding.[136]

D. SUMMARY

Section I provides a guide as to whether or not a particular proposal will be held negotiable by the Federal Labor Relations Council. The chart found in Appendix A is a synopsis of the findings detailed in the section. If this were the stopping point of the scope of negotiations in question, it would appear a compilation of this sort would provide the answer to most negotiability disputes. In addition, this compilation, when compared to actual collective bargaining agreements, points out the true nature of labor-management relations in the Federal service: once the Council has determined a particular proposal is negotiable, the odds are very much in favor of that particular proposal being included in the collective bargaining agreement (or at least in agreements entered into by any agency subsequent to the Negotiability decision).[137] It is my contention the system has thus evolved into a search for the parameters of the scope of bargaining. And, since the Order has been in effect for almost eight years, the number of decisions rendered has pretty well established what those parameters are. Therefore, through its limit on the scope of negotiations, Executive Order 11,491 actually is promulgating

the "Standard Collective Bargaining Agreement in the Federal Service." Included in that agreement will be those articles detailed "negotiable" in Appendix A. Excluded will be articles detailed "non-negotiable." [138]

The ultimate arbiter of my thesis that a favorable negotability determination by the Federal Labor Relations Council is tantamount to including the disputed proposal in the Collective Bargaining Agreement is the Federal Services Impasse Panel. Should the parties be unable to reach agreement regarding a proposal, the Panel is utilized to resolve the impasse. The Panel consists of at least three members appointed by the President.[139] Upon request by either party, the Panel may recommend procedures for resolution or it may settle the dispute by appropriate action. Prior to requesting Panel consideration, the parties may seek assistance from the Federal Mediation and Conciliation Service.

The Panel is empowered to dismiss the request, direct that negotiations be resumed (with or without mediation assistance), direct factfinding, authorize voluntary settlements, or take any other action it deems appropriate. Included within the last option is the power to impose settlement. Should one of the issues presented to the panel concern a negotiability question, even if so determined by the Panel's own motion, the Panel will refer this question to the Council before taking further action.[140] Thus, if the Council determines a proposal to be negotiable, the question becomes whether the Panel will direct the proposal be included in the Collective Bargaining Agreement should the parties reach impasse. [141]

To date, the Federal Services Impasse Panel has actually ordered specific proposals be included in a collective bargaining agreement seven times. In five of these decisions, the Panel has ordered the proposal propounded by the union be included in the agreement.[142] In one, Employment Standards Administration, both the union and the agency submitted proposals regarding the contents of a Proposed Work Report Form. The proposals were almost identical, except the agency proposal required the employee filling out the Report to provide more data regarding action taken on each case than the union proposal called for. The Panel ordered the agency proposal be included in the agreement.[143] The final case, National Labor Relations Board, involved a union proposal concerning office space for employees belonging to the unit. The bargaining history was replete with offers and counter-offers, with the union ultimately proposing:

> "The agency is to take reasonable efforts to provide private offices to professional employees if and when additional office space is provided..." [144]

The proposal went on to state the following factors would be considered in determining who would be entitled to individual offices: (1) nature of work being performed by the employee, (2) length of service and grade, (3) amount of present space, (4) space and personnel needs of agency, (5) union-official status of employees, and (6) agency past action and future plans concerning expansion. The agency proposed:

> "Employees are entitled to, and management shall continue to take reasonable steps to provide, safe and healthful working conditions, including reasonable office space, and shall continue to give careful consideration to providing appropriate physical surroundings." [145]

The Panel ordered the agency proposal be included in the agreement, concluding:

> "The affected employees have adequate space within the meaning of GSA guidelines, although there is a shortage of space at the Employer's headquarters. Moreover, although the employer made several offers aimed at increasing the privacy of the current office space, none were accepted by the union. Additionally, the record does not show that office space conditions for public sector employees -- Federal or non-Federal -- in comparable work situations are generally different." [146]

The paucity of decisions makes it difficult to make any judgments regarding the Panel's propensities in this situation. Certainly a preponderance of the cases decided have been in favor of union proposals. Of the two that weren't, one posed a very insubstantial conflict, Employment Standard Administration. The only guidelines that could be drawn are from National Labor Relations Board, holding that past practices in the Federal (public) service will be considered, all other considerations being equal.

If my belief, that once the Council has determined a proposal to be negotiable the agency simply submits to its inclusion into the agreement, is valid, we will continue to see few cases actually being decided by the Panel.

## II. ARBITRATION AWARDS

> "A negotiated agreement may provide for the arbitration of grievances. Arbitration may be invoked only by the agency or the exclusive representative. Either party may file exceptions to the arbitrator's award with the Council, under regulations prescribed by the Council.." [147]

By far the majority of collective bargaining agreements entered into under Executive Order 11,491 include provisions for the arbitration of grievances. [148] Unfortunately, arbitration, as

it has evolved under the Order, also has a tremendous impact on the scope of negotiations. This is due to the fact the Order allows the Federal Labor Relations Council to review and reverse arbitration awards.[149] The Council will reverse an arbitration award (1) if the arbitrator was biased, (2) if the findings of fact were clearly erroneous, and/or (3) if the award violates applicable law, appropriate regulation or the Order.[150] It is the third of these criteria that is of importance to the problem at hand.

It first must be understood that the concept of arbitration, as it has evolved under the Order, is vastly different than labor arbitration in the private sector. Although there certainly are variations, in the private sector the arbitrator is confined to the four corners of the agreement:

> "The arbitrator shall have no right to amend, modify, nullify, ignore, or add to the provisions of the Agreement. He shall consider and decide only the particular issue(s) presented... and his decision and award shall be based soley upon his interpretation of the meaning and application of the terms of the Agreement to the facts of the grievance presented." [151]

The position taken by the Federal Labor Relations Council that it will reverse "...if an award violates applicable law, appropriate regulation, or the Order," completely rejects the private sector approach. Instead, the arbitrator is forced to decide two questions: (1) Has the agency violated the agreement? and (2) if so, does his decision and award comply not only with the collective bargaining agreement but also with applicable law, appropriate regulation or the Order? In effect the arbitrator is forced to interpret statutes, regulations, and the

Order. Unfortunately, the courts, the Civil Service Commission (and various other agencies) and the Federal Labor Relations Council are similarly tasked.

Based on this analysis, arbitration under the Order is nothing more than fictitious third party resolution. The grievant does not have his dispute arbitrated; at best, he is given a quasi-neutral forum in which to present his grievance. The result ultimately will be based on the decision of the ultimate interpreter of the statute, regulation or section of the Order involved. The decider may, or may not, attach some weight to the arbitrator's decision. Of course, there may be situations in which the arbitrator can confine his decision and award to the four corners of the collective bargaining agreement. However, these situations will not involve any employee rights and benefits affecting that most important of considerations -- money.

## A. BACK-PAY ACT

By far the preponderance of arbitration awards reviewed by the Council involve awards of back-pay. All compensation of this sort to Federal employees is governed by the Back-Pay Act:

> "(a) For the purpose of this section, 'agency' means --
>
> (1) an Executive Agency;
> (2) the Administrative Office of the United States Courts;
> (3) The Library of Congress;
> (4) the Government Printing Office; and
> (5) the government of the District of Columbia.
>
> (b) An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee --

(1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during that period; and

(2) for all purposes, is deemed to have performed service for the agency during that period, except that --

(A) annual leave restored under this paragraph which is in excess of the maximum leave accumulation permitted by law shall be credited to a separate leave account for the employee and shall be available for use by the employee within the time limits prescribed by regulations of the Civil Service Commission, and

(B) annual leave credited under subparagraph (a) of this paragraph but unused and still available to the employee under regulations prescribed by the Commission shall be included in the lump-sum payment under section 5551 or section 5552(1) of this title but may not be retained to the credit of the employee under section 5552(2) of this title.

(C) The Civil Service Commission shall prescribe regulations to carry out this section..." [152]

And, pursuant to section b(2)(C) of the Act, the Civil Service Commission has delegated to agencies the power to decide if the employee is entitled to Back Pay:

"When an appropriate authority (either the agency head or an official so designated in accordance with agency regulations) corrects an unjustified or unwarranted personnel action, the agency shall recompute for the period covered by the corrective action the pay, allowances, differentials, and leave account of the employee as if the unjustified or unwarranted personnel action has not occurred and the employee shall be deemed for all purposes to have rendered service in the agency for the period covered by the corrective action." (Emphasis mine)[153]

The Act plays a central part in each and every decision the Council has rendered concerning the viability of arbitration awards as affecting the scope of negotiations under the Order.

## 1. PROMOTIONS

This area has spawned by far the greatest amount of litigation. The usual grievance arises when the agency promoted from without the agreed area of consideration. The arbitrator would award retroactive promotion accompanied by back pay. The agency would take exception to the award and, prior to October, 1974, the Council uniformly held the awards were in violation of the Back Pay Act. [154] However, in 1974 the Comptroller-General rendered decision B-180010. In this case, the General Counsel of the National Labor Relations Board filled a clerical vacancy in his office by selecting an applicant from outside the agency and thereby rejecting four admittedly "well-qualified" applicants who were already employed by the agency. The controlling provision of the collective bargaining agreement read as follows:

> "ARTICLE IX: Clerical Promotions. Section 1. Introduction -- the parties agree that the mission and responsibilities of the Office of General Counsel in the enforcement of the National Labor Relations Act, as amended, demand a high degree of staff effectiveness. It is therefore the policy of the General Counsel:
>
> a. To obtain and retain the best personnel available and to utilize as fully as possible all valuable and appropriate experience.
>
> b. To fill vacancies by promotion or re-assignment of persons already employed in the Agency, provided their personal qualifications, training and experience are equal to those of applicants from other sources.
>
> c. That recruitment from outside the Agency is usually resorted to only to fill positions at the entrance level or to fill positions for which eligibles are in short supply or to appoint individuals who will add to the personnel resources of the Agency." [155]

The rejected applicants filed a grievance and the arbitrator found the agency should have selected one of the four agency

applicants. He thus directed the agency to re-run the selection, considering only the grievants and, upon selection, the selectee be made whole for any loss of wages sustained. The General Counsel selected one of the agency applicants and requested, pursuant to 31 U. S. Code Sec. 71, the Comptroller-General render a decision as to the appropriateness of a back-pay award. The Comptroller-General held back-pay was warranted in this situation.[156] The Council acceded to the Comptroller-General's interpretation, although it did hold in order for the award to be sustained the arbitrator must find "but for" the violation of the agreement by the agency the grievant would have been promoted. [157]

However, the decision by the Council in the Marshall Space Flight Center case casts some doubt on the continued viability of this analysis. Here the grievant, who had been demoted without cause rather than suffer discharge due to a reduction in force, was entitled under the collective bargaining agreement to special consideration for promotion. However, the agency chose not to fill the position from repromotion eligibles, and eventually selected someone other than the grievant. The applicable provisions of the agreement were:

> "Section 28.06...an employee demoted in NASA without personal cause is entitled to special consideration for repromotion to any vacancy for which he is qualified and in the area of consideration at his former grade (or any intervening grade) before any attempt is made to fill the position by other means.
>
> Section 28.07. Employees eligible for repromotion will be given special consideration for promotion vacancies prior to announcement of such vacancies under the Merit Promotion Plan.

> Section 23.02. The Employer agrees to implement the promotion plan in accordance with all applicable existing or future rules or regulations and directives issued by the Civil Service Commission and the Agency." [158]

The arbitrator determined "...the failure to promote the grievant to the vacancy...was arbitrary and capricious. (He) directed the grievant be offered promotion to the position...(and) he be retroactively compensated." The agency appealed this award to the Council, which sought interpretation from the Civil Service Commision. The Commission held that although Federal Personnel Manual Chapter 335, Sub-chapter 2, Requirement 1 "...strongly encourages" the re-promotion of special consideration candidates, it does not "mandate that such re-promotion occur." The Commission went on to state;

> "...management must retain the freedom to decide, without interference, which candidate it will select from among those referred for a given position under established procedures, or in fact, to make no selection at all. Whether or not the arbitrators interpretation of the agreement and the merit promotion plan was correct, the parties could not have appropriately agreed to subject management's reasons for selecting one candidate over another to review by a third party because it would contravene management's right to make final selection for promotions." (emphasis mine) [159]

While this case only remotely involves "areas of consideration," the language "...the parties could not have appropriately agreed to subject management's right to select one candidate over another..." certainly would apply to the situation detailed in the NLRB case. In addition, even if the Civil Service Commission were to reconsider, the language "...contravene management's right to make final selections for promotions..." would apply with equal force to an agency objection the award violates Section 12(b)(2) of the Order.

On the other hand, were the agency to have acceeded to the arbitrator's decision, the Comptroller-General most likely would have agreed to a back pay award:

> "Since this case was withdrawn from the Federal Labor Relations Council in order to submit the question of back pay to this Officer, it does not appear that the Council ruled on the question of whether or not the promotion provision in the agreement, or the arbitrator's award thereunder, violated the retained right of the agency to promote employees. However, while that question is essentially one for the Council, we note that the agreement and the award would appear to be proper since the provision of the agreement is in consonance with subchapter 3 - 3a of Chapter 335 of the Federal Personnel Manual which provides that it is within the discretion of the agency to limit its consideration of applicants for positions to employees within the organization and the agreement only instructed the agency to do that." [160]

How the Comptroller-General would rule subsequent to Marshall Space Flight Center is questionable. It appears the Council is taking the position that all such awards violate Section 12(b(2) of the Order, dispensing with Comptroller-General decisions and Civil Service Commission interpretations. In Community Services Administration, Region V, the arbitrator found the agency had violated the collective bargaining agreement in refusing to fill a vacant GS-12 position. Instead, the agency had deleted this position and created a new GS-7/9 position. In reversing the award to promote the grievant to the GS-12 position with back pay, the Council held this violated the agency's right not to hire under Section 12(b)(2).[161] The Council made a similar determination in Army and Air Force Exhange Service, Dallas. Here the arbitrator found the grievant's "lack of career progression... was due to her position as a union officer..." in conflict with the agreement. "The agency will immediately offer (the grievant) a work assignment in Arlington, Texas, as a Procurement Assistant

at the highest grade 8 step." (This was a promotion for this grievant.) The Council held this award violated Section 12(b)(2).

The only case subsequent to Marshall which upheld an arbitrator award involved a situation in which the grievant had already been promoted prior to the arbitrator's decision.[163]

Should the agency choose to dispute an arbitrator's award of promotion with back pay, it most likely will succeed if it argues the award violates Section 12(b)(2). If it chooses to acceed to the award, B180010 may still apply or the Comptroller-General may adopt the interpretation of the Civil Service Commission in Marshall Space Flight Center. A third alternative would be to continue to allow promotion and back pay in "area of consideraion" cases while denying it in "special consideration," "reorganization," and "union discrimination" cases -- in effect adopting an ad hoc approach. The first alternative provides consistency but not relief; the second is wholly dependent on agency discretion; and the third is totally devoid of consistency. None of the alternatives provide meaningful relief to employees denied promotion in violation of a collective bargaining agreement within traditional labor arbiration guidelines.

### 2. OVERTIME

A similar pattern has emerged regarding overtime pay. Two potential situations can give rise to a grievance involving overtime: (1) The opportunity for overtime work is not afforded an employee in violation of a negotiated agreement, and (2) an employee is denied overtime for work performed in excess of the employee's regular work-week or outside regular duty hours in

violation of the agreement. The Back Pay Act is also controlling in these situations.

Regarding the first situation, prior to 1974, the Comptroller-General had uniformly held the Back Pay Act was not applicable unless the work was actually performed. This was changed by Ruling No. B-175275:

> "In the instant case the employee was deprived of overtime work in violation of a labor-management agreement -- an act of omission. If the agency had not improperly assigned the work, the employee would have worked and received overtime compensation. In view of this and our holding that an act of omission may form the basis of an award of back pay, we now hold the employee may be awarded back pay for the overtime lost under the provisions of the Back Pay Act."[164]

The Council decided a grievant was entitled to overtime in the second situation in Mare Island Naval Shipyard, although the grievant must still meet the "but for" test.[165]

However, in Immigration and Naturalization Service, Burlington, Vt., an arbitrator awarded overtime to employees who were denied overtime in contravention of the collective bargaining agreement. The agency sought Council review and the Council held:

> "Such an award, by ordering the activity to maintain its past practice, thereby negating the activity's determination to assign (non-unit) Inspectors to the inspections during (their) regular tour of duty, contravenes the right reserved to management by Section 12(b)(5) of the Order." [166]

An agency can argue that any award which allows for the payment of overtime for denial of the opportunity to perform the work in effect would force the agency to assign the overtime initially to the grievant. This negates the agency's opportunity to select someone else to perform the work. It would appear, therefore, the award of overtime for opportunity denied is no longer available.

If the employee has actually performed the work, the award is

still available. In U.S.M.C. Supply Center, Albany, Georgia, the employees were detained at the gate after working hours by a gate search. An arbitrator's award of overtime pay was upheld by the Council. [167]

## B. OTHER AWARDS

### 1. TRAVEL PAY AND ALLOWANCES

The Council has reviewed arbitration awards in situations involving employee benefits other than promotions and/or overtime pay. In FAA, Eastern Region, the agreement provided: "An employee permitted to travel by privately owned vehicle will be paid mileage at the rate authorized..." Agency policy was that requests to travel by private vehicle must be decided by the agency within 15 days after the request was submitted. The grievant applied and his request was not acted upon within the allotted time, although an agency official indicated his request would be approved. He departed via private vehicle, but the agency subsequently disapproved his request. The arbitrator held the agency violated the collective bargaining agreement and ordered the grievant reimbursed. The agency sought review of the award and the Federal Labor Relations Council requested an opinion from the Comptroller-General. The Comptroller-General held the award violated Federal Travel Regulations. First, assuming the agency's policy was that if the applicant had not been notified within 15 days his request was disapproved he was entitled to travel by private vehicle, this policy "...would circumscribe the agency's responsibility to make certain determinations required by the Federal Travel Regulations." Second, "...the fact an agency official indicated to (the grievant) that his request would be

approved does not bind the Goverhment as that official was without authority to approve the request. Utah Power and Light v. U.S., 243 U.S. 389 (1917)" [168]

In three other cases, however, arbitrator's awards for travel-related expenses were upheld. An Air Traffic Controller stationed in Anchorage, Alaska, was sent to school in Oklahoma City. Upon completion of his training course, he was to be reassigned to a "remote area" of Alaska. Since he was to be transferred from Anchorage, he was allowed to store personal belongings at government expense. While at school, however, a new job opened in Anchorage which he applied for. His application was accepted, only now the Agency refused to reimburse him for storage expenses. The employee filed a grievance which was upheld by the Council (after seeking a ruling from the Comptroller-General). [169] In IRS, Chicago, the grievants sought per diem commensurate with assignment to temporary posts of duty outside thier normal commuting areas. The Council referred the matter to the Comptroller-General who resubmitted the case to the arbitrator:

> "Specifically, the resubmission is for the purpose of having the arbitrator clarify and interpret his award as to his finding therein with regard to the extent of the Chicago commuting area under the criteria contained in the applicable agency regulation and as to whether the grievants lived within or without that commuting area." [170]

Finally, in FAA, Alaska Region (#2), the agency informed an employee he was entitled to leave between duty stations. Upon his reporting to his new station (Anchorage), the agency determined such a grant was in error and deducted 18 hours of pay and withheld 104 hours of leave. The employee grieved and the arbitrator ruled he was entitled to repayment of the deducted salary

and restored the leave credit. The agency appealed. Once again the Council sought a ruling from the Comptroller-General, who held even though there was no authority to grant the employee the leave, the Waiver Statute [171] would allow him to recover in this situation.

> "Generally, the criteria (of the statute) will be met by a finding that the erroneous payment of pay or allowances occurred through administrative error and there is no indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee."[172]

## 2. TEMPORARY PROMOTIONS

An agency will often assign an employee to perform the duties of a higher, and better paying, grade. On January 9, 1975, the Federal Aviation Administration, Standiford Air Traffic Control Tower, Louisville, Ky., filled a GS-13 position with three GS-12 employees, each employee occupying the position for 45 days. The employees argued they were entitled to the higher rate of pay for the 45 day period, filed a grievance, and the arbitrator agreed with the employees. The agency sought Council review. The Council, in turn, requested an interpretation from the Civil Service Commission. The case turns on an interpretation of Chapter 300 of the Federal Personnel Manual:

> "Since extended details also conflict with the principles of job evaluation, details will be confined to a maximum period of 120 days unless prior approval of the Civil Service Commission is obtained..."

The collective bargaining agreement incorporated Civil Service Regulations: "Article 23 -- Section 1. Details shall be governed by Civil Service Commission regulations..." The arbitrator decided the 135 days involved in this situation exceeded the 120 day maximum imposed by the Civil Service Commission (the agency had not

sought approval for an extension). The Commission ruled the 120 day maximum applies to the temporary assignment of an individual employee to a position and not to the filling of a particular position by more than one employee. Therefore, the award was set aside. [173]

In Turner-Caldwell, the Comptroller-General ruled:...employees detailed to higher grade positions for more than 120 days without prior Civil Service Commission approval, are entitled to retroactive promotions with back pay for the period beginning with the 121st day of the detail." [174]

### 3. INCENTIVE AWARDS

> "The Employer agrees that quality step increases, special achievement awards, or other awards based entirely on job performance, shall be used exclusively for rewarding employees for their performance of assigned duties. This program shall not be used to discriminate among employees or to affect favoritism."

The grievant in this case argued he had been discriminated against when a supervisor had recommended him for an incentive award which had not been forthcoming (the supervisor retired between the recommendation and the filing of the grievance and the grievant's new supervisor had not resubmitted.). The arbitrator ruled he should receive the award. In construing the Incentive Awards Act, on request of the Council, the Comptroller-General ruled:

> "FAA Order 3450.7B (the agency order implementing the Act) specifically provides that, although an employee's immediate supervisor is responsible for initiating a special achievement award recommendation, there must be at least two levels of supervision involved in the initiation and approval process...Thus a supervisor's recommendation does not necessarily mean that an award will be granted since approval at a higher level is required."

Based on this interpretation, the Council modified the award to require the grievant be recommended by his current supervisor for the award.[175]

## 4. POSITION CLASSIFICATIONS

An agency may assign duties extraneous to a "position description" provision in the collective bargaining agreement.

> "It is agreed that the primary function for an air traffic controller consists of duties directly related to air traffic control."

The grievant in this case was also assigned weather observation and reporting duties. The arbitrator held the extra duties were beyond the scope of the article in the agreement and the parties were to "...meet for the purpose of reaching agreement on the issue and to establish fair and equitable compensation for the extra work involved." The Civil Service Commission, upon request of the Council, held:

> "An employee who disputes the classification of his position is entitled to request a determination of that issue by the Civil Service Commission under the statutory procedure for classification appeals. 5 U.S.C. Sec. 5512; 5 C.F.R. 511.603."[176]

## 5. MISCELLANEOUS AWARDS

An arbitrator's award in favor of a labor organization against the agency will be denied on grounds similar to sovereign immunity.[177] An arbitrator's award that enforces a provision of the agreement giving preferential treatment to women and minorities (the agreement required the agency to hire women or minority applicants in preference to other equally well-qualified applicants until a certain percentage of jobs in each grade category was filled) was overturned by the Council on the ground it contravened Title VII of the Civil Rights Act.[178] An arbitrator's award that reassigned a grievant to his original shift, after he had been

assigned to another shift, in violation of the provision in the agreement that senior employees were to be given preference in the selection of shifts, was held by the Council to be in violation of Section 12(b)(5).[179]

C. EFFECT OF ARBITRATION AWARDS ON THE SCOPE OF NEGOTIATIONS

The glaring inconsistency is while the agency has clearly violated the terms of the collective bargaining agreement, the grievant is oftentimes denied relif. This may even occur when the article which is the subject of the grievance has previously been held negotiable by the Council. The Council is certainly aware of this possibility, but so far has taken the approach that negotiability issues and arbitration awards are two separate areas and will be decided independently. "...The possibility of diverse interpretations of the merit promotion plan by arbitrators is clearly not dispositive."[180] (regarding the question of negotiability.) This position may increase the scope of negotiations; but will not provide any relief for the bona fide grievant not already available under statute and Civil Service Regulations. The situations in which the Council has denied an arbitrator's award, assuming the award conformed to the agreement, might just as well have resulted in a finding of non-negotiability regarding the article of the agreement relied on by the grievant and the arbitrator.

To pursue this farther, I would argue the Council's review of arbitration awards has further limited the scope of negotiations as follows:

(1) Areas of consideration for promotions
(2) Special consideration for promotion
(3) Union discrimination
(4) Overtime not actually performed

(5) Travel Pay and Allowances (as detailed in FAA, Eastern Region
(6) Temporary Promotions

cursory examination of Appendix A will show this further limiting leaves very little of substance includable in the collective argaining agreement.

However, I have to believe labor organizations representing ederal employees are aware of the limits of an arbitrator's ower as detailed above. The fact the preponderance of collective bargaining agreements contain an arbitration clause must ean Federal employees would rather submit discretionary agency olicy decisions affecting employee rights and benefits to third arty adjudication than to the head of the agency. In addition, he system does not prevent the head of the agency from overturning n arbitrator's decision against a grievant, providing the matter, n fact, falls within the parameters of agency discretion. The mployee has a potential two bites at the apple. The critical ssue thus becomes under what circumstances has the head of an gency been delegated, by statute or regulation, discretion to ecide an employee rights and benefits question.

> "We believe that once an agreement with a labor organization is approved under Section 15 of Executive Order No. 11,491, and the provisions of the agreement are consistent with laws and regulations and within the guidelines of Sections 11, 12, and 13 of the Executive Order, then, unless specifically provided in the agreement, such provisions become non-discretionary agency policies. Further, we believe that when an agency, in its discretion, chooses to agree to binding arbitration, then a decision of an arbitrator, if otherwise proper, becomes, in effect, the decision of the head of the agency involved." [181]

ollowing the reasoning of this case, an argument can be made he agency head has the discretion to implement the award should e choose to exercise it. Whether or not the pattern of seeking

:ouncil review will continue depends on the posture of the agency. ly experience has been if review is available, it will be sought.

## III. JUDICIAL REVIEW

Courts have entertained actions seeking review in both negoiability decisions[182] and arbitration awards.[183] The basis for llowing review appears to be Section 702 of the Administrative rocedure Act:[184]

> "We have found no statutory authority which would preclude review by the Federal Courts of a final determination by the Federal Labor Relations Council. There is a basic presumption of judicial review within the meaning of 5 U.S.C. Sec. 702 so long as no statute precludes relief or the action is not one committed by law to agency discretion.'[185]

he Court will inquire whether the Council abused its discretion:

> "...the question is whether the decision (of the Council) was 'made without a rational explanation, inexplicably departed from established policies or rested...on other considerations that Congress could not have intended to make relevant.' Littell v. Morton, 445 F. 2d 207 (4th Cir. 1971)."[186]

he Federal Courts will not entertain actions unless all remedies rovided for by the Order are exhausted.[187]

The few number of cases decided, plus the application of the xhaustion doctrine, leave the Council the ultimate decider for at east the time being. I think it is fair to say the system the ouncil has developed is a far cry from the traditional collective argaining in America. And the obstacle responsible is the limits he Order -- and the Council, the Civil Service Commission, the omptroller-General, etc,-- places on the scope of negotiations. f the Federal employee is destined to truly secure the advantages f collective bargaining, the initial reform should be directed oward modification of these limitations.[188]

## IV. THE FUTURE

I believe I have demonstrated that limitations on the scope of negotiations imposed by Executive Order 11,491 have caused the current system to evolve into something quite removed from collective bargaining.[189] If one is willing to accept this state of Federal labor-management relations, the inquiry could end. Most commentators, some legislators, and the President of the United States believe the inquiry should continue.[190] I agree!

There are two alternatives to the present system: 1) establish some forum other than Congress for fixing terms and conditions of employment for Federal Employees, or 2) allow Federal employees to participate in determining such terms and conditions. The first alternative would clearly violate the Constitution; and the second is collective bargaining.[191] Since collective bargaining appears to be the only alternative, the inquiry thus becomes how far should the scope of bargaining be expanded. [192]

An obvious starting point for this inquiry would be a study of proposed legislation introduced in Congress dealing with Labor-Management Relations in the Federal Service. A great deal of such legislation has been proposed. It has ranged from including all public sector employees (federal, state and local) within the coverage of the National Labor Relations Act, as amended,[193] to simply incorporating the provisions of Executive Order 11,491 into law. [194]

## A. Current Proposed Legislation

Two bills, both entitled "The Federal Service Labor Management Act of 1977," were introduced in the 95th Congress.[195] This proposed legislation tends to follow the pattern of Executive Order 11,491 in all respects save those relating to the scope of negotiations. However, instead of tasking the Assistant Secretary of Labor for Labor-Management Relations with deciding unit questions, supervising elections, deciding grievances and deciding unfair labor practice complaints, the bills establish the Office of General Counsel of the Federal Labor Relations Authority (the Authority performs virtually the same functions as the Federal Labor Relations Council under the Order).[196]

The outstanding features of H.R. 13 concerning the scope of negotiations are (1) there is no reserved management rights clause, and (2) conditions of employment are detailed in the bill.

> "Section 7103(a)(13) -- Conditions of employment means personnel policies, practices, and matters affecting working conditions, including, but not limited to --
>
> (A) pay practices;
> (B) work hours and schedules;
> (C) overtime practices;
> (D) safety;
> (E) promotion procedures and assignment, transfer, detail, leave and reduction-in-force practices;
> (F) seniority;
> (G) procedures for taking disciplinary actions;
> (H) grievance and appeal procedures; and
> (I) all matters subject to negotiations in any agency on, or prior to, the effective date of this Act..."[197]

In addition, the bill severely limits an agency's authority to promulgate regulations affecting terms and conditions of employment. Under this system, any proposed regulation relating to

employees of more than one agency is transmitted to a Federal Personnel Policy Board. The Board is composed of seven members from among management officials, seven members from labor organizations and a Chairman. The Board considers each regulation so transmitted and "submits its conclusions and recommendations to the issuing agency which shall consider such conclusions and recommendations before issuing the policy....involved in the proposal." Any proposal applicable only to employees of the issuing agency "shall be subject to negotiation."[198] Arbitrations awards may still be reversed if contrary to law or regulation but back pay is expressly authorized as a remedy.[199] The bill also ammends the Back-Pay Act to include grievance decisions as actions falling with the coverage of the Act.[200] The bill does not provide for resolution of negotiability issues separate from refusal to bargain procedures. However, it does provide for judicial review of decisions by the Federal Labor Relations Authority, which would include refusal to bargain determinations.[201]

H.R. 9094 makes only one major departure from H.R. 13. It incorporates a system for the establishment of pay, benefits, and classification of Federal employees. Briefly, the bill allows the President, through his Agent (composed of the Chairman, Civil Service Commission; the Secretary of Labor; and the Director, Office of Management and Budget) to submit recommendations regarding pay, benefits and classification to the Federal Employees Pay and Benefits Committee (composed of seven members selected from labor organizations.). The Agent and the

Committee, with the assistance of the Federal Mediation and Conciliation Service, if necessary, attempt to agree on appropriate adjustments. If the parties cannot agree, the matter is submitted to the Arbitration Board on Federal Employees Pay and Benefits (composed of seven members -- three appointed by the President, three by the Federal Employees Pay and Benefits Committee, andthe seventh, the Chairman, to be selected by the other six). Should the President agree with the Committee or the Board, that recommendation for adjustment will be submitted to Congress by 1 September, and becomes effective unless Congress rejects the recommendation. Should the President disagree, both plans -- i.e., the President's and the Arbitration Board's -- will be submitted to Congress. The President's plan becomes effective unless Congress adopts an alternate.[202]

The bill also adds four items to the list of conditions of employment while also listing three exclusions:

> "Section 7103(a)(16) -- 'conditions of employment' means personnel policies, practices and matters affecting working conditions, including --
>
> (A) Pay practices;
> (B) work hours and schedules;
> (C) overtime practices;
> (D) safety;
> (E) promotion procedures and assignment, transfer, detail, leave and reduction-in-force practices;
> (F) seniority;
> (G) procedures for disciplinary actions;
> (H) grievance and appeal procedures;
> (I) contracting out;
> (J) use of military personnel;
> (K) training; and
> (L) travel and per diem;
>
> but does not include policies, practices, and matters relating to --
>
> (i) discrimination in employment because of race, color, religion, sex, age or national origin;

(ii) political activities prohibited under subchapter III of chapter 73 of this title; or

(iii) provisions of Federal law which affect working conditions, which apply to both public and private employees, and which are not negotiable under collective bargaining agreements with private employers." [203]

H.R. 9094 does away with the Federal Personnel Policy Board approach to the promulgation of agency regulations. It would appear the drafters felt the language: "...The agency may not make or apply rules or regulations which restrict the scope of collective bargaining permitted by this Chapter..." [204] coupled with the fact it is an unfair labor practice "...to fail or refuse to comply with any provision of this chapter." [205] placed enough limitations on the agency's ability to make unilateral changes by means of agency regulations.

B. RECOMMENDATIONS

Assuming, for political reasons, the National Labor Relations Act will not be amended to include Federal employees, the approach taken by H.R. 9094 in delineating subjects of collective bargaining appears to be the most advantageous method for affecting change. The politicians must decide what terms and conditions of employment they wish to retain control over and what terms and conditions they wish to submit to participation by Federal employees in their determination.

Professor Summers has written an article that attempts to answer this question with the emphasis on political forces at work in the process of arriving at terms and conditions of employment for public employees.[206] Briefly, he balances demands of employees against the effect the granting of such

demands will have on budgetary decision making. The greater the impact of the demand on expenditures of taxpayers' monies, the less likely the political forces at work will accede to collective bargaining as a means of determining that particular term or condition of employment. The less impact, the greater the possibility. For example, an increase in wages has an immediate and drastic effect on any budget and thus most politicians would rather not submit this subject to collective bargaining. On the other hand, personnel policies and practices have little or no impact on the budget and thus should be subjects of collective bargaining. He delineates terms and conditions of employment for public employees into seven basic categories: (1) wage increases, (2) indirect wage payments (such as insurance, etc...), (3) deferred wage costs (pension plans), (4) reduction in level or service (leave, holidays, etc...), (5) increase in level of services, (6) determination of goals and methods, and (7) personnel practices and administration.[207] The first two categories impact directly on current budget constraints and thus political forces would mitigate strongly against their being included within the scope of negotiations. Deferred wages costs impact on future budgets and thus provide an ideal trade-off to potential employee demands for direct and indirect wage increases. Further down the scale, manipulations of the level of service provided by public employees and determination of goals and methods will have even less impact on current expenditures. Finally, as to personnel policies and administration, Professor Summers believes:

> "Resistance to union demands comes primarily from the government itself. Agency and department heads will resist encroachments on their management authority in the name of better and more efficient service to the public."[208]

The effect on expenditures will be negligible.

If Professor Summers' categorizations are appropriate, and I believe they are, there should be little or no political resistance to establishing a collective bargaining system whereby the scope of negotiations would include all categories except direct and indirect wage increases.[209]

History does not bear out this hypothesis. Proposed legislation and review by the Executive Branch have constantly played with fine tuning the scope of bargaining with no appreciable success on the expansion end of the scale.[210] This situation, aside from the usual bureaucratic and legislative inertia, is the result of the tremendous influence the merit system plays in Federal employment. The politicians are convinced the most visible, and thus the most potentially damaging politically, facet of government service is the caliber of performance of federal employees as viewed by the taxpayer, whether services rendered or corruption perceived. To avoid public outcry over poor service and/or corruption, the politicians are unwilling to allow federal employees any control over their own destinies. Until this phobia is dispelled, there is little hope for change.

The best example of the political realities of this fear is the profound changes in the Civil Service system that have taken place since the passage of the original Act in 1883. As one commentator has stated:

> "The Pendleton Act created the Commission and charged it with the very limited responsibility of establishing a system for 'open, competitive examinations for testing the fitness of applicants for the public service' and for fulfilling vacancies 'from among those grades highest.' The Act specifically prohibited political influence as a basis for selecting federal employees and, instead, required federal managers to rely on more objective methods to distinguish the relative abilities of candidates in conducting their selection processes. Hence, merit was defined as the absence of political influence in the selection of employees for federal service.
>
> Despite this limited objective, the concept of merit now has been expanded to include all aspects of an individual's work environment and has become a talisman for resisting change." [211]

I would submit instead of the merit system being a talisman for resisting change, it has succeeded in becoming a talisman for removing federal employees from participation in determining the terms and conditions of their employment.[212] Change has certainly taken place, change toward all pervasive political control. In this way the politican can so limit employee prerogatives that any conduct deviating from the almost biblical concept of merit Congress believes the public expects from its servants is the result of employee aberration and not through any fault on the part of the politicans.

There are two obvious retorts to this perception: (1) Initiative is stifled, resulting in automoton performance, and (2) greater efficiency will result if the employee is allowed to participate in the process of formulating the terms and conditions of his or her employment. Yet these old saws have been trotted out time and time again to no avail.

Fortunately, the fairly recent reorganization of the Postal Service can serve as a model for the decision maker in deciding

how increased employee participation affects the public's image of the Federal employee.[213] A perusal of current periodicals would leave even the most optimistic reformer skeptical of the efficacy of the change, for they routinely condemn the change.[214] From this standpoint, there appears to be little hope for increasing employee participation in the Federal service as a whole.

This would be the end of the discussion, absent a meteoric improvement in Postal services, were it not for the age-old handmaiden of labor-management relations -- power. While the Congress may want the public to believe the Postal Reorganization Act of 1970 was wholly a response to the inefficiencies of the system, even the most biased perusal of the legislative history of the Act leads to the conclusion the postal strike of March, 1969, played a very important part.[215] In truth, the agreement between the administration and the representatives of postal unions which terminated the work stoppage became in effect, Public Law 91-375.[216] The no-strike law notwithstanding,[217] the traditional labor weapon succeeded where all other efforts had failed. The question could thus be asked of the Congress: Do public employees have to resort to a strike to accomplish their stated desire to participate in determining the terms and conditions of their employment?

## C. CONCLUSION

Congress is impaled on the horns of a dilemma. Lessening control over terms and conditions of employment will bring the individual politician closer to receiving blame for the inadequacies of the Federal bureaucracy. Maintaining control could

well be catastrophic. The only alternative appears to be a compromise somewhere between total control by Congress and a scope of bargaining based on the private model. For sure, some change in the current status of arbitrations awards would be relatively painless from a political standpoint and would do away with what I consider to be the greatest inequity of the present system. An amendment to the Back Pay Act similar to that propounded by H.R. 9094 would accomplish this purpose. Further than that, much soul searching will be necessary. I do not mean to sound like a prophet of doom; but I have worked in the Federal service for fourteen years and until Federal employees succeed in gaining greater participation in determining the terms and conditions of their employment, I am afraid the specter of March, 1969, remains. On the other hand, until the Federal employee, primarily through his elected labor representative, can convince the public (and the Congress) collective bargaining <u>will</u> provide better service at no increase in cost, the present inertia will remain. Were I affiliated with a labor organization representing Federal employees, I would direct all of my efforts to that goal.

NEGOTIABLE

rea of Consideration (N. 49)
(N. 51)

emporary promotion in excess
f 30 days (N. 50)

niforms (N. 59)

blication of vacancies in bargaining
nit positions
(N. 60)

ffice space (N. 61)

ess than unit wide bargaining
N. 81)

ouisville (N. 89)

mployee exchanges (N. 99)

equest for shifts/seniority
s deciding factor (N. 100)

lexitime (N. 103)

laintenance of drag roads
N. 107)

romotion review by "next
ighest supervisor" (N. 110)

reas of promotion (N. 112)

asic work-week (N. 120)

roduction goals (N. 121)

ssignment of overtime to non-
nit personnel (N. 124 - 126)

On Call" (N. 129)

vertime pay for union-employer
usiness in emergencies (N. 131)

verseas assignment (N. 133)

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2. Right to "non-select" Chap. 335, FPM (N. 38)
3. Unit priority v. reassignment eligible priority (N. 42)
4. Review of merit promotion standards (N. 43)
5. Wages (N. 44)
6. Incentive awards (N. 45)
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10. Cafeteria services (N. 73)
11. Theshhold supervisory questions (N. 74)
12. Parking for patients
13. Representatives on "management committees" (N. 77 - 79)
14. "Grade levels" (N. 80)
15. Staffing patterns (N. 85)
16. Assign ONLY within scope of classification (N. 91)
17. Numbers of employees (N. 94)
18. Equal distribution of work (N.
19. Tours of Duty (N. 97)
20. Rotation of Details (N. 101)
21. Equipment (N. 105)
22. Observation of employee's work performance (N. 108)

23. Who to promote (N. 114)

24. Who to hire (N. 115)

25. Non-unit personnel perform unit functions on weekends (N. 116)

26. Transfers (N. 118)

27. Work protection (N. 123)

28. Assignment of overtime to non-unit personnel (N. 126)

UNITED STATES CIVIL SERVICE COMMISSION

WASHINGTON, D.C. 20415

IN REPLY PLEASE REFER TO

YOUR REFERENCE

JAN 31 1978

LCDR, J.N. Baker, JAGC, USN
400 Perkins, No. 501
Oakland, California 94610

Dear Commander Baker:

This is to acknowledge receipt of your letter requesting various labor relations agreements in the Federal Service.

I am enclosing a copy of the listing of agreements that you forwarded. The two check marks indicate that we do not have these particular agreements on file.

The charge for sending you this information would be a fee of $30.00 for the staff time involved in assembling the information plus an additional charge of 10¢ per page for reproducing the agreements. There are roughly thirty to sixty pages per agreement.

Please contact me should you desire the agreements available.

Very truly yours,

## COLLECTIVE BARGAINING AGREEMENTS

Department of Transportation, Federal Railroad Administration AND
cal 2814, A.F.G.E. (American Federation of Gov't Employees) (1977)*
(202090)

A.F.G.E. Local 1923 AND Social Security Administration Head-
arters, Baltimore, Md. (1973)
(131510)

Nat'l Federation of Federal Employees, Local 1636 AND New
xico National Guard (1977).
(080905)

A.F.G.E. Local 1497 and 2165 AND General Services Administration,
ion 3 (1975). (190480)

Lodge 830, Internation Ass'n of Machinists AND Louisville
al Ordnance Station, Ky. (1976)
(072750)

A.F.G.E. and Immigration and Naturalization Service, Border
rol, Yuma, Ariz. (1971).

A.F.G.E. Local 2118 AND Los Alamos Area Office, ERDA (1975).
(220570 + 220580)

A.F.G.E. Local 2456 AND General Services Administration,
ion 3 (1975). (190380)

Veteran's Administration Independent Services Employees Unit
VA Research Hospital, Chicago (1973).
(460680)

Federal Employees Metal Trades Council AND Naval Supply Center,
leston, S.C. (1972).
(074730)

Patent Office Professional's Ass'n AND Dept. of Commerce,
Patent Office, (1975).
(031180)

A.F.G.E. Local 2152 AND GSA Region 3 (1976).

Internat'l Ass'n of Machinists AND Kirk Army Hospital, Md. (1973).
(062940)

N.F.F.E. AND Sheppard Air Force Base, Tx. (1973).
(058270)

Internation Brotherhood of Electrical Workers AND Corps of
neers, Little Rock, Ark. (1972).
(060790 + 060800)

.F.G.E. Local AND Immigration and Naturalization Service (1975).
(160020) (160030) (160035)

ffice of Administration, Animal and Plant Inspection Service
U.S. Dept. of Agriculture AND A.F.G.E., National Council
od Inspector Locals (1975)
(020470)

odge 2333, Int'l Ass'n of Machinists AND Wright- Patterson
Ohio (1974 (051770)

only dates I have available are the dates the Federal Labor
ons Council decided the negotiability issues in the cases. The
ent in question would have been decided subsequent to the dates
enthesis (although it may have been signed in the same year)
let me know if

1. 3 C.F.R. 861 (1966-1970 Compilation). The Order has been amended by Exec. Order No. 11,616, 3 C.F.R. 605 (1971-1975 Compilation), Exec. Order No. 11,636, 3 C.F.R. 634 (1971-1975 Compilation), Exec. Order No. 11,838, 3 C.F.R. 957 (1971-1975 Compilation) and Exec. Order No. 11,901, 41 Fed. Reg. 4807 (1976). The current text may be found in 1976 2 Lab. Rel. Exp. (BNA 4431.) (Hereinafter cited as Order)

2. Id, Preamble.

3. Id, Section 2(a). "Agency" means an executive department, a Government corporation, an independent establishment as defined in Section 104 of Title 5, U. S. Code, except the General Accounting Office." "The Order does not apply to (1) the Federal Bureau of Investigation; (2) the Central Intelligence Agency; (3) any other agency or bureau, or entity within an agency, which has as a primary function intelligence, investigative, or security work, when the head of an agency determines, in his sole judgment, that the Order cannot be applied in a manner consistent with national security requirements and considerations; or (4) any office, bureau or entity within an agency which has as a primary function investigation or audit of the conduct or work of officials or employees of the agency for the purpose of ensuring honesty and integrity in the discharge of their official duties, when the head of the agency determines, in his sole judgment, that the Order cannot be applied in a manner consistent with the internal security of the agency; (5) the Foreign Service of the United States: Department of State, United States Information Agency and Agency for International Development and its successor agency or agencies; (6) the Tennessee Valey Authority." Id, Section 3(b).

4. Id, Section 2(e).

"(e) Labor organization means a lawful organization of any kind in which employees participate and which exists for the purpose, in whole or in part, of dealing with agencies concerning grievances, personnel policies and practices, or other matters affecting the working conditions of their employees; but does not include an organization which --

(1) consists of management officials or supervisors, except as provided in section 24 of this Order;

(2) assists or participates in a strike against the Government of the United States or any agency thereof, or imposes a duty or obligation to conduct, assist, or participate in such a strike;

(3) advocates the overthrow of the constitutional form of government in the United States; or

(4) discriminates with regard to the terms or conditions of membership because of race, color, creed, sex, age, or national origin."

5. Id, Section 2(b).

"(b) Employee means an employee of an agency and an employee of a nonappropriated fund instrumentality of the United States but does not include, for the purpose of exclusive recognition or national consultation rights, a supervisor, except as provided in section 24 of this order."

6. Id, Section 11(a).

7. See generally, Cox & Dunlap, Regulation of Collective Bargaining by the National Labor Relations Board, 63 Harv. L. Rev. 389 (1950).

8. Order, supra Note 1, Section 11(a).

9. Id, Section 4(c)(2).

10. Id, Section 4(a).

11. Id, Section 11(c)(4).

12. 5 C.F.R. Sections 2411.21 - 2411.28 (1977).

13. See generally Fiberboard Paper Products Corp. v. NLRB, 379 U.S. 203; NLRB v. Bricklayers & Masons Local 3, 405 F. 2d 469 (9th Cir. 1968).

14. Order, supra, Note 1, Section 19(a)(6)

15. Id, Section 6(a)(4).

16. Id, Section 4(c)(1).

17. Id, Section 11(d).

18. See generally Decisions and Interpretations of the Federal Labor Relations Council, U. S. Gov't Printing Office, Washington, D. C. (F.L.R.C.) Reported decisions of the council not contained in F.L.R.C. are cited as United States Federal Labor Relations Council, Report of Case Decisions (hereinafter cited as Report No. ).

19. See generally Am. Fed'n of Gov't Employees (A.F.G.E.) Local 1923 and Social Sec. Adm'n Headquarters, Baltimore, Md., F.L.R.C. No. 71A-22, 1 F.L.R.C. 390, at 396 (May 23, 1973).

20. See 5 C.F.R. Sections 2411.21 - 2411.28 (1977), for regulations governing review of negotiability issues and 29 C.F.R. Sections 203.1 - 203.27 (1976) for regulations governing Unfair Labor Practice proceedings.

21. Order, supra note 1, Section 11(a).

22. 5 U.S.C. Sections 5301 - 04 (1970).

23. 5 U.S.C. Section 8331 (1970).

24. 5 U.S.C. Sections 8701 - 16 (1970).

25. 5 U.S.C. Sections 8901 - 13 (1970).

26. 5 U.S.C. Sections 6301 - 26 (1970).

27. 5 U.S.C. Section 5541 (1970).

28. 5 U.S.C. Sections 4301 - 08 (1970).

29. 5 U.S.C. Sections 4101 - 18 (1970).

30. Nat'l Fed'n of Fed. Employees (N.F.F.E.), Local 1636, and N.M. Nat'l Guard, F.L.R.C. No. 73A-23, 1 F.L.R.C. 567 (Oct. 18, 1973).

31. 32 U.S.C. Section 709(g)(2) (1970).

32. N.F.F.E., Local 1636 and N.M. Nat'l Guard, F.L.R.C. No. 73A-23, 1 F.L.R.C. 567 at 569 (Oct 18, 1973).

33. See generally 5 C.F.R., Chap. I. See also Federal Personnel Manual.

34. See 5 C.F.R. Section 2411.25 (1977).

35. See generally Fed. Employees Metal Trade Council (F.E.M.T.C.) of Charleston and Charleston Naval Shipyard, S.C., F.L.R.C. No. 73A-7, 1 F.L.R.C. 398 (May 23, 1973).

36. FPM, supra note 33.

37. N.T.E.U. and U. S. Customs Serv., Office of Regs. and Rulings, Wash. D.C. F.L.R.C. No. 76A - 102, Report No. 123 (Apr. 7, 1977).

38. Id.

39. Nat'l Border Patrol Council and I.&N.S., F.L.R.C. No. 76A-68, Report No. 136 (Aug. 31, 1977).

40. FPM supra Note 33, Chap. 335, para. 6 of subchapter 2.

41. Id.

42. Nat'l Border Patrol Council and I&N.S. F.L.R.C. No. 76A-68 at 10, Report No. 136 (Aug 31, 1977).

43. F.E.M.T.C. of Charleston and Charleston Naval Shipyard, S.C., F.L.R.C. No. 73A-7, 1 F.L.R.C. 398 (May 23, 1973).

44. N.A.G.E. Local 5-65 and Memphis Naval Air Station, F.L.R.C. No. 74A-104, 3 F.L.R.C. 483 at 484 (Jul. 30, 1975)

45. N.F.F.E., Local 155 and Tobacco Div., AMS, USDA, F.L.R.C. No. 74A-31, 3 F.L.R.C. 247 (May 9, 1975).

46. Nat'l Treasury Employees Union (N.T.E.U.) and Dept. of Treasury, IRS, Philadelphia Dist., F.L.R.C. No. 75A-118, Report No. 118 (Nov. 19, 1976).

47. See generally N.T.E.U. and U. S. Customs Serv., Region VII, F.L.R.C. No. 76A-28, Report No. 123 (Apr. 7, 1977).

48. See generally Nat'l Border Patrol Council and I.&N.S., F.L.R.C. No. 76A-68, Report No. 136 (Aug. 31, 1977).

49. Id at 11.

50. I.A.M. Lodge 2424 and Aberdeen Proving Ground, Md., F.L.R.C. No. 70A-9, 1 F.L.R.C. 61 (Mar. 9, 1971).

51. A.F.G.E., Local 1923, and Social Sec. Adm'n. Headquarters, Baltimore, Md., F.L.R.C. No. 71A-22, 1 F.L.R.C. 390 (May 23, 1973).

52. Nat'l Border Patrol Council and I.&N.S., F.L.R.C. No. 76A-68, Report No. 136 (Aug. 31, 1977).

53. 3 C.F.R. 957 (1974-1975 Compilation).

54. United Fed'n of College Teachers, Local 1460, U. S. Merchant Marine Academy and F.L.R.C. No. 73A-64, 2 F.L.R.C. 238 (Oct. 25 1974).

55. Order, supra Note 1, Section 11(a).

56. 5 C.F.R. 2413.2 (1977).

57. Nat'l Ass'n of Gov't Employees (N.A.G.E.) Local RS-100 and Adjutant Gen., State of Ky., F.L.R.C. No. 76A-109, Report No. 132 (Jul. 20, 1977).

58. 32 U.S.C. Section 709 (1970).

59. N.A.G.E., Local No. R14-87 and Kan. Nat'l Guard, F.L.R.C. No. 76A-16, Report No. 120 (Jan 19, 1977).

60. N.F.F.E. Local 1332 and Headquarters, U. S. Army Material Development and Readiness Command, F.L.R.C. No. 76A-29, Report No. 128 (Jun. 7, 1977.

61. A.F.G.E. Local 1626 and GSA Region 5, F.L.R.C. No. 76A-121, Report No. 131 (Jul. 13, 1977).

62. 5 C.F.R. 2413.2 (1970).

63. "A technician...shall, while so employed, be a member of the National Guard and hold the military grade specified by the Secretary concerned for that position." (Emphasis mine.)

64. Order, supra Note 1, Section 12(b). See infra Notes 110-116.

65. Id.

66. See, N.T.E.U. and U. S. Customs Serv., Region VII, F.L.R.C. Bi, 76A-28, Report No. 123 (Apr. 6, 1977).

67. Order, supra Note 1, Section 12(b)(5). See infra Notes 122-129.

68. I.&N.S. and Nat'l I.&N.S. Council, F.L.R.C. No. 76A-26 1977), 699 Gov't Emp. Rel. Rep. (BNA) 21.

69. Id.

70. Order, supra Note 1, Section 11(a).

71. National Labor Relations Act, Section 9, 29 U.S.C. Section 159 (1970).

72. See generally B. Meltzer, Labor Law: Cases, Materials & Problems (2d ed. 1977) Chap. 9E. (Hereinafter cited as Meltzer).

73. F.E.M.T.C. of Charleston and Charleston Naval Shipyard, S.C., F.L.R.C. No. 72A-27, 1 F.L.R.C. 415 (May 25, 1973).

74. Tex. Air Nat'l Guard Council of Locals, A.F.G.E. and Tex. Air Nat'l Guard, F.L.R.C. No. 74A-71 (1976), 657 Gov't Emp. Rel. Rep, (BNA) A-14.

75. A.F.G.E. Local 1738 and VA Hospital, Salisbury, N.C., F.L.R.C. No. 75A-103 (1976), 675 Gov't Emp. Rel. Rep. (BNA) A-2.

76. A.F.G.E. Local 3006 and Idaho Nat'l Guard, F.L.R.C. No. 77A-70, Report No. 139 (Dec. 20, 1977).

77. N.T.E.U. and Customs Serv., Region VII, Los Angeles, Cal., F.L.R.C. 76A-111, Report No. 131 (Jul. 13, 1977).

78. N.F.F.E. Local 1745 and VA Data Processing Center, Austin, Tex., F.L.R.C. 77A-1, Report No. 135 (Aug. 26, 1977).

79. N.T.E.U. and Customs Serv., Region VII, Los Angeles, Cal., F.L.R.C. 76A-111, Report No. 131 (Jul. 13, 1977).

80. N.T.E.U. and IRS, F.L.R.C. 76A-132, Report No. 133 (Jul. 17, 1977

31. A.F.G.E., Council of Prisons Locals and Dept. of Justice, Bureau of Prisons, F.L.R.C. No. 76A-38, Report No. 129 (Jun. 22, 1977). The interesting objection raised by the agency is this proposal would force interest arbitration at the local level. Since the "master" agreement contained an arbitration clause the local facility could force the local agency to arbitrate the negotiability of a "local" proposal. The agency likened this procedure to "interest arbitration." The Council held the arbitrator would only rule on the scope of negotiation in accordance with the scheme established by the Master Agreement and would not be incorporating the proposal into the local agreement. I believe this argument by the agency points out the false impression carried by many agency negotiators that if they "lose" the scope of negotiation issue the proposal in question will automatically be included in the collective bargaining agreement.

32. Order, supra Note 1, Section 11(b).

33. A.F.G.E. Locals 1497 and 1165 and GSA, Region 3, F.L.R.C. No. 74A-48, 3 F.L.R.C. 396 (Jun. 26, 1975).

34. Order, supra Note 1, Section 15.
Most agencies and labor organizations appear to be aware of this construction. The following clause is contained in many collective bargaining agreements:

"It is agreed and understood that subjects appropriate for consultation or negotiation between the Employer and the Union include personnel policies and practices and matters affecting working conditions of unit employees which are within the discretion of the employer, including, but not limited to, health and safety, employee training, labor-management relations, employee services, methods of adjusting grievances and appeals, hours of work, pay practices, granting of leave, promotion plans, demotion practices and reduction in force practices."

See Collective Bargaining Agreement between U. S. Naval Weapons Station, Charleston, Va., and American Federation of Government Employees, Local 2298, (1976) 671 Gov't Empl. Rel. Rep. (BNA) X-1. See also Collective Bargaining Agreement between U. S. Army Infantry Center, Ft. Benning, Ga., and Federal Employee Metal Trades Council, (1976) 633 Gov't Emp. Rel. Rep. (BNA) X-1.

35. N.F.F.E. Local 1745 and VA, Data Processing Center, Austin, Tex., F.L.R.C. No. 77A-1, Report No. 135 (Aug. 26, 1977).

36. Int'l Ass'n of Firefigters, Local F-111 and Griffiss AFB, F.L.R.C. No. 71A-30, 1 F.L.R.C. 322 (Apr. 19, 1973).

37. Id, at 333.

38. Lodge 830, I.A.M. and Louisville Naval Ordnance Sta., Ky., F.L.R.C. No. 73A-21, 2 F.L.R.C. 55 at 56 (Jan. 31, 1974).

9. Id at 60. See also I.&N.S. and A.F.G.E., F.L.R.C. No. 74A-13, 3 F.L.R.C. 380 at 385-386 (Jun. 26, 1975).

0. I.A.M. and Wright-Patterson AFB, Ohio, F.L.R.C. No. 74A-2, 2 F.L.R.C. 280 at 283 (Dec. 5, 1974).

1. Id at 284.

2. See A.F.G.E. and I.&N.S. Border Patrol, Yuma, Ariz., F.L.R.C. No. 70A-10, 1 F.L.R.C. 71 (Apr. 15, 1971); A.F.G.E., Local 2118 and Los Alamos Area Office, ERDA, F.L.R.C. No. 74A-30, 3 F.L.R.C. 296 (May 22, 1975); A.F.G.E., Local 2456 and GSA Region 3, F.L.R.C. No. 74A-63, 3 F.L.R.C. 439 (Jul. 21, 1975); Int'l Ass'n of Firefighters, Local F-103 and U. S. Army Electronic Command, F.L.R.C. No. 76A-19, Report No. 122 (Mar. 22, 1977); Local 1485, N.F.F.E. and Coast Guard Base, Miami, Fla., F.L.R.C. No. 75A-77, Report No. 110 (Aug. 2, 1976); and Graphic Arts Int'l. Union, Local 234 and ERDA, Oak Ridge, Tenn., F.L.R.C. No. 76A-65, Report No. 132 (Aug. 2, 1977).

3. A.F.G.E. (Nat'l Border Patrol Council and Nat'l Council of I.&N.S. Locals) and I.&N.S., F.L.R.C. No. 73A-25, 2 F.L.R.C. 207 at 211 (Sep. 30, 1974).

4. Id at 212.

5. N.A.G.E. and McClellan AFB, F.L.R.C. No. 75A-81 (1976), 675 Gov't Emp. Rel. Rep. (BNA) A-1.

6. A.F.G.E., Local 1940 and Plum Island Animal Disease Laboratory, F.L.R.C. No. 71A-11, 1 F.L.R.C. 101 at 102 (Jul. 9, 1971).

7. Id.

8. N.T.E.U. and U. S. Customs Service, Region VII, F.L.R.C. No. 74A-28, Report No. 123 (Apr. 7, 1977) at 8.

9. Id at 12.

00. Laborers Int'l. Union of N.A., Local 1056 and VA Hospital, Providence, R.I., F.L.R.C. No. 75A-113, Report No. 124 (Apr. 21, 1977).

01. I.&N.S. and A.F.G.E., F.L.R.C. No. 74A-13, 3 F.L.R.C. 380 at 386-387 (Jun. 26, 1975).

02. Marshall Eng'r & Scientists Ass'n, Local 27 and NASA, Marshall Space Flight Center, Huntsville, Ala., F.L.R.C. 76A-81, Report No. 130 (Jul. 13, 1977).

03. Id. Query: Doesn't this limitation effectively negate the purpose of the proposal?

04. I.&N.S. and A.F.G.E., F.L.R.C. No. 74A-13, 3 F.L.R.C. 380 at 391 (Jun. 26, 1975).

105. Id, at 392.

106. A.F.G.E. and I.&N.S., Border Patrol, Yuma, Ariz., F.L.R.C. No. 7A-10, 1 F.L.R.C. 71 at 72 (Apr. 15, 1971). "Drag roads are a means of surveillance used to detect tracks of persons illegally entering the United States in Southwest border areas."

107. Id.

108. N.A.G.E. Local R12-58 and McClellan AFB, F.L.R.C. No. 75A-90, Report No. 114 (Oct. 22, 1976) at p. 5.

109. Order, supra Note 1, Section 12(b).

110. VA Independent Serv. Employees Unit and VA Research Hospital, Chicago, Ill., F.L.R.C. No. 71A-22, 1 F.L.R.C. 390 (May 23, 1973)

111. A.F.G.E. Local 1923 and Social Security Adm'n Headquarters, Baltimore, Md., F.L.R.C. No. 71A-22, 1 F.L.R.C. 390 at 394 (May 23, 1973).

112. Id at 397.

113. I.A.M. and Kirk Army Hospital, Md., F.L.R.C. No. 72A-18, 1 F.L.R.C. 525 at 537 (Sep. 17, 1973)

114. Id at 538. See also Nat'l Maritime Union and NOAA, F.L.R.C. 76A-9, Report No. 128 (Jun. 21, 1977).

115. N.F.F.E., Local 943 and Keesler AFB, F.L.R.C. No. 74A-66. 3 F.L.R.C. 735 at 738 (Nov. 18, 1975). See also Nat'l Border Patrol Council and I.&N.S., F.L.R.C. 76A-68, Report No. 136 (Aug. 31, 1977).

116. A.F.G.E. Local 1966 and VA Hospital, Lebanon, Pa., F.L.R.C. No. 72A-41, 1 F.L.R.C. 584 (Dec. 12, 1973).

117. Nat'l Border Patrol Council and I.&N.S, F.L.R.C. 76A-68, Report No. 136 (Aug. 31, 1977) at p. 16.

118. Id, at p. 17

119. F.E.M.T.C. and Naval Supply Center, Charleston, S.C., F.L.R.C. 71A-52, 1 F.L.R.C. 235 (Nov. 24, 1972). See also N.T.E.U. and U.S. Customs Service, Region VII, F.L.R.C. No. 76A-28, Report No. 123 (Apr. 7, 1977).

120. Id at 240. See also Local 2219, I.B.E.W. and Corps of Engineers, Little Rock, Ark., F.L.R.C. No. 71A-46, 1 F.L.R.C. (Nov. 20, 1973).

121. Patent Office Professionals Ass'n and U. S. Patent Office, F.L.R.C. 75A-13, 3 F.L.R.C. 635 at 641 (Oct. 3, 1975).

122. Tidewater, Va., F.E.M.T.C. and Public Works Center, Norfolk, Va., F.L.R.C. No. 71A-56, 1 F.L.R.C. 431 (Jun. 29, 1973).

. See Pattern Makers, AFL-CIO and Naval Ship and Research Development Center, Bethesda, Md., F.L.R.C. No. 73A-28, 1 F.L.R.C. 516 (Aug. 17, 1973); F.E.T.C. and Naval Shipyard, Charleston, S.C., F.L.R.C. 72A-46, 1 F.L.R.C. 610, (Dec. 27, 1973); Philadelphia Metal Trades Council and Philadelphia Naval Shipyard Employees Cafeteria Association, F.L.R.C. No. 75A-5, 1 F.L.R.C. 509 (Aug. 10, 1973); Local 3, American Federation of Technical Engineers and Philadelphia Naval Shipyard, F.L.R.C. No. 71A-48, 1 F.L.R.C. 423 (Jun. 29, 1973); Local 174, American Federation of Technical Engineers and Superintendent of Shipbuilding, 11th Naval District, San Diego, Ca., F.L.R.C. No. 71A-49, 1 F.L.R.C. 427 (Jun. 29, 1973); A.F.G.E., Local 1170 and Public Health Service, Seattle Wash., F.L.R.C. No. 76A-92, Report No. 130 (Jul. 12, 1977); A.F.G.E. Local 916 and Tinker AFB, F.L.R.C. 76A-96, Report No. 131 (Jul. 13, 1977); and Graphic Arts Int'l Union and E.R.D.A. Oak Ridge, Tenn., F.L.R.C. 76A-65, Report No. 132 (Aug. 2, 1977).

. Local 1485, N.F.F.E. and Coast Guard Base, Miami, Fla., F.L.R.C. No. 75A-77, Report No. 110 (Aug. 2, 1976).

. Philadelphia Metal Trades Council and Philadelphia Naval Shipyard, F.L.R.C. No. 72A-40, 1 F.L.R.C. 456 at 458 (Jun. 29, 1973).

. N.A.G.E., Local R12-58 and McClellan AFB, F.L.R.C. No. 75A-90, Report No. 114 (Oct. 22, 1976).

. A.F.G.E. Local 1170 and PHS Hospital, Seattle, Wash., F.L.R.C. No. 76A-92, Report No. 130 (Jul. 12, 1977).

. N.T.E.U. and U. S. Customs Service, Region VII, F.L.R.C. No. 76A-28, Report No. 123 (Apr. 7, 1977).

. Order, supra Note 1, Section 11(a).

. United Fed'n of College Teachers, Local 1460 and U. S. Merchant Marine Academy, F.L.R.C. No. 71A-15, 1 F.L.R.C. 210 (Nov. 20, 1972).

. Air Force Defense Language Institute, Lackland AFB and A.F.G.E., Local 1367, F.L.R.C. No. 73A-64, 2 F.L.R.C. 238 (Oct. 25, 1974).

. Nat'l Border Patrol Council, Nat'l I.&N.S. Council, A.F.G.E. and I.&N.S., F.L.R.C. No. 76A-47, Report No. 114 (Sept. 29, 1976). See infra Notes 139 - 141 and accompanying text detailing the functions of the Federal Services Impasse Panel.

. A.F.G.E. Local 1668 and Elmendorf AFB, F.L.R.C. No. 72A-10, 1 F.L.R.C. 361 (May 15, 1973). See also I.A.M. and Louisville Naval Ordnance Station, Ky., F.L.R.C. No. 73A-21, 2 F.L.R.C. 55 (Jan. 31, 1974).

. Philadelphia Metal Trades Council and Philadelphia Naval Shipyard, F.L.R.C. No. 72A-73, 1 F.L.R.C. 287 (Apr. 3, 1973).

. A.F.G.E., Local 2152 and GSA Region 3, F.L.R.C. No. 76A-106 (1977) 719 Gov't Emp. Rel. Rep. (BNA) 5.

N.F.F.E., Local 476 and Joint Tactical Communications Office, Ft. Monmouth, N.J., F.L.R.C. No. 72A-42, 1 F.L.R.C. 499 (Aug 8, 1973)

This appears to be a common phenomena in public sector collective bargaining: "I have heard all too many teachers' union officials, for example, say, 'when you ask me why these things are in the contract, was it because I fought to get them? No.' Their answer is, 'I was flabbergasted when the employer told me yes. I put them on a laundry list, just like we did in the private sector, and lo and behold, the employer came back, or the school board came back, and they said, 'Sure, we will agree to A, B, X, Y, Z.'" at 144. Statement by Prof. Harry T. Edwards, Harvard Law School. See Labor Relations Law in the Public Sector, A.S. Knapp, Ed., ABA Section of Labor Rel. Law (1977).

This hypothesis can be tested by a review of Collective Bargaining Agreements entered into pursuant to the Order. Those agreements available to me at present contain most of the proposals deemed negotiable by the Council. See generally Collective Bargaining Agreement Between U. S. Naval Weapons Station, Charleston, Va., and A.F.G.E. Local 2298, (1976) 671 Gov't Emp. Rel. Rep. (BNA) X-1. The Labor Agreement Information Retrieval System of the Civil Service Commission's Office of Labor-Management Relations is able to provide copies of all pertinent collective bargaining agreements. However, the cost involved in procuring copies through the mail is more than I wish to bear at this time (see Appendix B--by my calculations, approximately $125.00).

Order, supra Note 1, Section 5.

See 5 C.F.R. 2471.1 - 2471.16 (1977).

The following case illustrates the Panel's ultimate power in this situation. Department of Transportation, Federal Railroad Administration and Local 2814, A.F.G.E., 76 F.S.I.P. No. 7 (Jan. 19, 1977) (Release #74). The order of the Federal Services Impasse Panel reads as follows:

"Pursuant to the authority vested in it by Executive Order 11491 as amended, and in accordance with the findings set forth above, the Federal Impasse Panel hereby orders the following:

I. The parties shall include the following provisions within their new agreement at Article XVII:

A grievance is defined to be any dispute between the Employer and the Union or an employee or employees covered by this agreement.....

Matter subject to statutory appeal procedure are not subject to grievance arbitration.

II. The parties shall include the following within their new agreement at Article XVIII:

The arbitrator shall have no power to add to, subtract from, disregard, alter, or modify any of the terms of this agreement or the aforementioned published policies of the Panel."

2. (1) GSA Region III, Washington, D.C., and Local 2151, A.F.G.E., Case No. 73 FSIP 18, Panel Release No. 41 (Jul. 11, 1974). The Panel directed the parties to "include in their current agreement a provision to the effect that the temporary assignment for more than 30 consecutive calendar days of an employee to a higher grade position which is above the journeyman level shall be made by temporary promotion." (2) Dept. of Justice, I.&N.S., Washington, D.C., and Nat'l Council of I.&N.S. Locals, A.F.G.E., Case No. 73 FSIP 14, Panel Release No. 50 (Mar. 19, 1975). The Panel ordered the parties to include in the agreement (a) specific language which provides the employees with assurance that, where investigations are prolonged, the employer will grant a reasonable extension of the response period to the proposed disciplinary action, and (b) the parties negotiate a new promotion plan that would include a procedure for the resolution of grievances. (3) Pa. Nat'l Guard and Pa. State Council of Ass'n of Civilian Technicians, Case No. 75 FSIP 7, Panel Release No. 62 (Feb. 27, 1976). "The parties shall include in their agreement a provision to the effect that the union may at any time within 180 days from the effective date of the agreement notify the employer of its desire to engage in negotiations on the subjects of (1) reductions in force, and (2) military uniforms; and the parties will commence negotiations within a reasonable period of time after receipt of such notice by the employer." (4) DOT, Fed. RR Adm'n, Wash., D.C., and Local 2814, A.F.G.E., Case No. 76 FSIP 7, Panel Release No. 74 (Jan. 19, 1977). The union proposal was ordered included in the agreement en toto. "A grievance is defined to be any dispute between the Employer and the Union or an employee or employees covered by this agreement, which may pertain to any matter involving the interpretation or application of (1) this agreement, or (2) published agency policies and regulations which concern (a) personnel policies and practices, and (b) matters affecting working conditions, whether or not specifically covered by this agreement. Matters subject to statutory appeal procedures are not subject to this grievance procedure." (5) DOT, FAA, Nat'l Aviation Facilities Experimental Center, Atlantic City, N.J., and Local 2335, A.F.G.E., Case No. 76 F.S.I.P. 9, Panel Release No. 75 (Jan. 24, 1977). This case involved the same proposal as cited in Fed. R.R. Adm'n and the Panel reached the same decision.

3. Dep't. of Labor, Employment Standard Adm'n., Wash. D.C., and Nat'l Council of Field Labor Lodges, A.F.G.E., Case No. 76 FSIP 49, Panel Release No. 79 (Apr. 27, 1977).

4. NLRB and NLRB Union, Case No. 75 FSIP 41, Panel Release No. 71 (Sep. 14, 1976) at 1.

5. Id at 2.

6. Id at 3.

Order, supra Note 1, Section 13(b).

See Frazier, Labor Arbitration in the Federal Service, 45 Geo. Wash. L. Rev. 712 at 713 (1977).

Order, supra Note 1, Section 4(c)(3).

5 C.F.R. 2411.37(a).

Meltzer, supra Note 72, Appendix: An Illustrative Collective Bargaining Agreement, Article VI, Section 1.

5 U.S.C., Section 5596 (1970).

5 CFR 550.804(a) (1977).

See generally, A.F.G.E., Local 2499 and Headquarters, Defense Supply Agency, F.L.R.C. No. 73A-51, 2 F.L.R.C. 200 (Sep. 24, 1974).

54 Comp. Gen. 312 at 313-314 (1974).

Id. The striking feature of this case is the agency did not appeal the award to the Council but rather, apparently desiring to implement the award, sought approval from the Comptroller-General accordingly. There is no question under current Council decisions (see supra Note 154) the Council would have reversed the award.

Army Depot, Toole, Utah and A.F.G.E., Local 2188, F.L.R.C. No. 75-104 (1976) 675 Gov't Emp. Rel. Rep. (BNA) A-3.

NASA, Marshall Space Flight Center, Huntsville, Ala. and Marshall Engineers & Scientists Ass'n, Local 127, Int'l Fed'n of Professional & Technical Engineers, F.L.R.C. No. 76A-130, Report No. 135 (Aug. 23, 1977) at p. 2.

Id, at p. 3.

54 Comp. Gen. 312 at 319.

Community Serv. Adm'n, CSA Region V and A.F.G.E. Local 2816, F.L.R.C. No. 75A-120, Report No. 124 (Apr. 7, 1977).

Army & Air Force Exchange Serv., Dallas, Tex., and A.F.G.E. Local 2921, F.L.R.C. No. 76A-20, Report No. 128 (Jun. 21, 1977). See also Nat'l Council of OEO Locals, A.F.G.E. and O.E.O., F.L.R.C. No. 73A-67, (1975) 592 Gov't Emp. Rel. Rep. (BNA) A-5.

A.F.G.E., Local 1760 and Social Security Adm'n, N.E. Program Center, F.L.R.C. 77A-31, Report No. 136 (Aug. 26, 1977).

54 Comp. Gen. 1071 at 1074 (1974).

Mare Is. Naval Shipyard and Mare Island Metal Trades Council, F.L.R.C. No. 74A-64 (1976) 657 Gov't Emp. Rel. Rep. (BNA) A-17.

6. I.&N.S., Burlington, Vt., and A.F.G.E. Local 2538, F.L.R.C. No. 76A-131, Report No. 131 (Jul. 13, 1977).

7. U.S.M.C. Supply Center, Albany, Ga. and A.F.G.E., F.L.R.C. No. 75A-98, Report No. 122 (Mar. 8, 1977).

8. PATCO and FAA, Eastern Region, F.L.R.C. No. 76A-10, Report No. 121 (Jan. 18, 1977).

9. PATCO and FAA, Alaska Region, F.L.R.C. No. 76A-98, Report No. 124 (Apr. 12, 1977).

0. IRS, Chicago District Office and N.T.E.U., F.L.R.C. 76A-150, Report No. 128 (uUn. 7, 1977).

1. 5 U.S.C. Section 5584 (1970).

2. PATCO and FAA, Alaska Region, F.L.R.C. No. 76A-99, Report No. 133 (Aug. 17, 1977).

3. FAA, Standiford Tower, Louisville, Ky. and PATCO, F.L.R.C. No. 76A-6, Report No. 128 (Jun. 7, 1977).

4. 55 Comp. Gen. 539 (1975). In I.A.M. and Naval Air Rework Facility, Norfolk, Va., F.L.R.C. 77A-11, Report No. 140 (Dec. 20, 1977), the grievant was detailed to fill a vacant supervisory position. The collective bargaining agreement provided that any employee so detailed in excess of ten (10) days was entitled to temporary promotion. The grievant remained "detailed" for 120 days and applied for Back-Pay. The arbitrator's award was reversed by the Council on the ground the grievant was not qualified for the position in question and thus was not entitled to the temporary promotion and back-pay. This case could signal continued vitality for articles in agreements requiring temporary promotions of less than 120 days since the Council could have just as easily cited FAA Louisville in reversing the award.

5. FAA, Montgomery Rapcon Tower, Ala., and PATCO, F.L.R.C. No. 75A-32, Report No. 119 (Dec. 20, 1976).

6. FAA and PATCO, F.L.R.C. 76A-113, Report No. 129 (Jun. 30, 1977). See U.S. v. Testan, 424 U.S. 392 (1976) holding a person so aggrieved is entitled to a statutory appeals procedure pursuant to 5 U.S.C. Section 5512 (1970) and 5 CFR 511.603.

7. I.A.M. Lodge 2424 v. United States, No. 172-76 (Ct. Cl. decided Oct. 19, 1977). The emphasis in this decision is a labor organization is attempting to collect dues the government had terminated the check-off on. Since no statute gives a labor union the right to recover such monies (contrasted with the Back Pay Act's application to individual employees), the arbitrator's award was reversed.

8. OEO and A.F.G.E., Local 267, F.L.R.C. No. 75A-23 (1976) 655 Gov't Emp. Rel. Rep. (BNA) C-2.

179. VA Hospital, Canandaiqua, N.Y. and Serv. Employees Int'l Union, F.L.R.C. No. 72A-42, 2 F.L.R.C. 164 (Jul. 31, 1974).

180. Graphic Arts Int'l Union, Local 234 and ERDA Oak Ridge, Tenn., F.L.R.C. 76A-65, Report No. 132 (Aug. 2, 1977).

181. 54 Comp. Gen. 312 at 316 (1974). See United States General Accounting Office Manual on Remedies Available to Third Parties in Adjudicating Federal Employee Grievances (Mar. 30, 1977) for the Comptroller-General's views on the powers of an arbitrator under the Order.

182. National Broiler Council v. Federal Labor Relations Council, 382 F. Supp. 322 (E.D. Va. 1974).

183. I.A.M. Lodge 2424 v. United States, No. 172-76 (Ct. Cl. decided Oct. 19, 1977).

184. 5 U.S.C. Section 702 (1970).

185. Mont. Chapter of Ass'n of Civilian Technicians v. Young, 519 F. 2d 1165 (9th Cir. 1975).

186. Nat'l Broiler Council v. Fed. Labor Relations Council, 382 F. Supp. 322 at 325 (E.D. Va. 1974).

187. See Montana Chapter of Association of Civilian Technicians v. Young, supra Note 99 (The plaintiffs desired to negotiate the uniform issue described supra notes 58-49 and accompanying text. However they chose to appeal the agency determination of non-negotiability directly to the Courts instead of to the Council. The Court held they must exhaust the remedies provided for by the Order.) See also Weitzel v. Portney, 548 F. 2d 489 (4th Cir. 1977). (In a suit to redress his failure to be promoted the plaintiff alleged, inter alia, the agency violated the collective bargaining agreement. The Court held he must pursue the grievance procedures established by the agreement and any routes of appeal provided by the Order before seeking relief in a Federal Court.) See also Rowe v. Tennessee, 431 F. Supp. 1257 (E.D. Tenn. 1977). (The plaintiff contended the defendants -- members of the Tennessee National Guard -- interfered with his right to join a union. "There is no indication the plaintiff exhausted any available remedies against these defendants for their alleged interference. Interference with an employee's efforts to join a union constitutes an unfair labor practice under Section 19 of Executive Order 11,491. His remedy, therefore, would be to file an unfair labor practice charge with the Assistant Secretary of Labor for Labor-Management Relations." Id at 1265.)

188. Some commentators advocate the abolishment of all limitations-- i.e., placing Federal employees within the coverage of the National Labor Relations Act. See Tobias, The Scope of Bargaining in the Federal Sector: Collective Bargaining or Collective Consultation, 44 Geo. Wash. L. Rev. 554 (1976). (Hereinafter cited as Tobias.)

189. See Notes 137 - 138 supra.

190. See Tobias, Note 188 supra; Summers, Public Employee Bargaining: A Political Perspective, 83 Yale L. J. 1156 (1974) (hereinafter cited as Summers); Kagel, Grievance Arbitration in the Federal Service: How Final and Binding? 51 Ore. L. Rev. 134 (1971); Edwards, The Emerging Duty to Bargain in the Public Sector, 71 Mich. L. Rev. 885 (1973); 1977 B.Y.U. L. Rev. 429 (1977); See Notes 193 - 209 infra for proposed legislation; The New York Times, March 2, 1978. p. A10 stated President Carter would "...propose creation of a Federal labor relations authority that would conduct union elections, define unfair labor practices and generally perform the tasks the National Labor Relations Board does in private industry."

191. U. S. Const., Art. I, Sec. 8, cl. 1.

192. Prof. Summers describes collective bargaining as: "...the process of establishing terms and conditions of employment in a written agreement negotiated between the public employer and a union acting as exclusive representative of the employees in the unit. See Summers, Note 190 supra at 1156.

193. See H.R. 13, 93rd Cong., 1st Sess. (1973).

194. See H.R. 4800, 94th Cong., 1st Sess. (1975).

195. H.R. 13, 95th Cong., 1st Sess. (1977) (hereinafter cited as H.R. 13) and H.R. 9094, 95th Cong., 1st Sess. (1977) (hereinafter cited as H.R. 9094).

196. Id, Sec. 2, Subsec. 7104.

197. H.R. 13, Note 193 supra, Sec. 2, Subsec. 7103(a)(13).

198. Id, Sec. 2, Subsec. 7113(c).

199. Id, Sec. 2, Subsec. 7121.

200. Id, Sec. 3, amendment to 5 U.S.C. Sec. 5596(b).

201. Id, Sec. 2, Subsec. 7122.

202. H.R. 9094, Note 195 supra, Sec. 2, Subsecs. 7114 - 7115. This system is similar to the Pay Comparability Act, 5 U.S.C. Secs. 5301-08.

203. Id, Sec. 2, Subsec. 7103(a)(16).

204. Id, Sec. 2, Subsec. 7103(a)(17).

205. Id, Sec. 2, Subsec. 7117(a)(7).

06. Summers, Note supra.

07. Id, at 1177 - 1183.

08. Id., at 1183.

09. Congressman Clay must have read Prof. Summers' article, as H.R. 9094 does just that.

10. See Note 137 supra; U. S. Federal Labor Relations Council. Labor Management Relations in the Federal Service, 1975).

11. Tobias, Note 188 supra at 560. See also Hearings on H.R. 13, HR. 9784, H.R. 10700 and Related Bills before the Subcommittee on Manpower and Civil Service of the House Comm. on Post Office and Civil Service, 93rd Cong., 2d Sess. (1974) (Ser. 93-51).

12. As a commentator stated in 1884: "Open competition presents at once the most just and practicable means of supplying fit persons for appointment. It is proved to have given the best public servants; it makes an end to patronage; and, besides being based on equal rights and common justice, it has been found to be the surest safeguard against partisan coercion and official favoritism." W. D. Foulke, The Theory and Practice of Civil Service Reform (Wash: NCSRL, 1884) at 11.

13. Postal Reorganization Act of 1970, Pub. L. 91-375, 84 Stat. 719 (codified in scattered sections of 2, 3, 5, 12, 15, 18, 31, 39, and 40, U.S.C.

14. See generally Newsweek, March 22, 1976 at 61; Newsweek Apr. 9, 1973 at 97; U. S. News and World Rep., Sep. 13, 1976 at 63; U. S. News and World Rep., Mar. 22, 1976 at 26; U. S. News and World Rep., Mar. 15, 1976 at 19; U. S. News and World Rep., Jul. 14, 1975 at 9; U. S. News and World Rep., Jul. 1, 1974 at 5; Time, Mar. 15, 1976 at 71; Time, Jul. 7, 1975 at 13; 55 Cong. Dig. 260 (1976); Nation's Business, Mar. 12, 1976 at 11; New Republic, Apr. 10, 1976 at 7; Commonweal, Jan. 18, 1976 at 357; Commonweal, Oct. 24, 1975 at 485; Nation, Mar. 22, 1975 at 325; Nat'l Rep., Dec. 21, 1973 at 1426.

15. See H. R. Rep. No. 1104, 91st Cong., 2d Sess., S. Rep. 912, 91st Cong., 2d Sess., reprinted in (1970) U. S. Code Cong. and Ad. News 3649.

16. Id at 3651-3652.

17. 5 U.S.C. Sec. 7311.

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Baker
The scope of bargaining under executive order 11,491.